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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 745

CHARLES SAWYER, SECRETARY OF COMMERCE,
PETITIONER

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 63–76) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 447–449), on consideration of motions for stays, is not yet reported.

JURISDICTION

The orders of the District Court were entered on April 30, 1952 (R. 76). On April 30, 1952, petitioner filed notice of appeal and docketed the

[1] Since respondents herein have filed a petition in No. 744 we shall, to avoid confusion, refer to them as "plaintiffs."

appeal with the Court of Appeals for the District of Columbia Circuit (R. 77). The petition for certiorari was filed, prior to judgment by the Court of Appeals, on May 2, 1952 (R. 456.) Certiorari was granted on May 3, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on the facts recited in Executive Order No. 10340 and established by the uncontroverted affidavits, the President had constitutional authority to take possession of plaintiffs' steel mills in order to avert an imminent nationwide cessation of steel production.

2. Whether, in the circumstances of this case, the district court erred in reaching and deciding the constitutional issues on motions for preliminary injunctions.

3. Whether the district court erred in granting injunctive relief.

CONSTITUTIONAL PROVISIONS AND EXECUTIVE ORDER INVOLVED

Article II of the Constitution provides, in pertinent part:

> SECTION 4. The executive Power shall be vested in a President of the United States of America. * * *
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> * * * * * *
>
> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or

affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

The Fifth Amendment provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Executive Order 10340, and orders issued pursuant thereto, are set out at R. 6, 22.

STATEMENT

These are proceedings for injunctive relief against the petitioner, the Secretary of Commerce, to restrain through him the action of the President in ordering the taking of possession and operation of certain of plaintiffs' properties by Executive Order 10340, 17 F. R. 3139, issued on April 8, 1952. The underlying circumstances and the proceedings below are as follows:

1. THE WAGE DISPUTE

On November 1, 1951, plaintiffs' employees, represented by the United Steelworkers of America, C. I. O., which had a collective bargaining agreement due to expire on December 31, 1951, gave notice to the plaintiffs that they wished in a proposed new collective bargaining agreement between the parties to effect changes in wages and working conditions over those established by the old contract. (R. 3, 81). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F. R. 3503. The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of the Wage Stabilization Board, requested the Board to investigate the dispute and promptly to report with recommendations as to fair and equitable terms of settlement.[2] The President noted that the union and the steel producers had made

[2] The Presidential letter of referral, the report of March 13, 1952, by the Steel Panel which heard the presentation of steel wage dispute, and the "Report and Recommendations" of the Wage Stabilization Board of March 20, 1952, all of which are contained in the certified transcript of record as appendices to the affidavit of Mr. Harry Weiss (R. 59–61), were omitted in printing the record. Copies of these documents have been assembled and deposited with the Clerk for the Court's use.

no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry. The President emphasized that the entire progress of national defense was threatened because any work stoppage would paralyze the entire steel industry and have an immediate and serious impact on the defense effort.

Pursuant to the referral, the Board immediately appointed a tripartite special steel panel (consisting of representatives of the public, of industry, and of labor) to hear all evidence and argument in the dispute and to make such reports as the Board might direct (R. 59). After a procedural meeting, public hearings were held in Washington, D. C., and New York City beginning on January 10, and continuing until February 16 (R. 60). The participating parties and the masses of evidence and argument heard are indicated by the Panel Report, dated March 13, 1952, a copy of which is attached to Mr. Weiss' affidavit. This Panel Report outlined the issues in dispute, summarized the position of the parties, and was submitted to the parties for consideration and comment. Meanwhile, the Board met and prepared the "Report and Recommendations of the Wage Stabilization Board," dated March 20, 1952, and submitted it to the President on that

date. A copy of the Board Report is attached to the affidavit of Mr. Weiss. The Board's recommendations, acceptable to the union, were rejected by steel management (R. 81).[3]

[3] Rejection of the Board's recommendations by plaintiffs was consistent with their position from the outset of the dispute. As stated by the Chairman of the Board in the March 20 report (pp. 5–6), after reviewing the critical nature of any labor dispute in the key steel industry, the "situation clearly called for unusually extensive bargaining. Instead, there was virtually no bargaining." On the major issues, such as wages, fringe benefits, etc., plaintiffs made no counter proposals, at least until after March 20, 1952. Report, pp. 6–7; Panel Report, March 13, 1952, *passim*. The need for bargaining in the best faith was underscored by the fact that the dispute presented the first occasion since 1947 for thorough review and revision of the collective bargaining agreements between the parties (Report, March 20, p. 5), and the fact that the Board's recommendations to the President were of a "catch-up" nature, designed to equate the position of steel workers with workers in comparable industries. Testimony of Nathan P. Feinsinger, Chairman, Wage Stabilization Board, Hearing before Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., March 31, 1952. See also Steel Panel Report, *passim*; Staff Report to Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, Senate Document 122, 82d Cong., 2d Sess. Perhaps, a principal stumbling block was the position taken by plaintiffs that any increase in wages required a compensating increase in prices, a position which Price Stabilization officials deemed absolutely destructive of the present stabilization program. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, Senate Document No. 118, 82d Cong., 2d Sess., pp. 6–7, and *passim*.

2. THE SEIZURE

As noted above, no progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to the Wage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. After plaintiffs' refusal to accept the Board's recommendations, the strike was called for 12:01 A. M., April 9, 1952 (R. 7). Ninety-six hours' notice had been given; the mill were closing and the fires were being banked. The resulting catastrophic threat to steel production was averted by the Executive Order issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The Secretary of Commerce thereupon issued Order No. 1 taking possession of the plants, facilities and other properties of plaintiffs and numerous other steel companies (R. 22). The Order, and the accompanying telegrams sent to the companies, designated the president or chief executive officer of each company as the Operating Manager for the United States and directed that the management's officers and employees of the plants continue their functions (R. 21).

The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court. See *infra*, pp. 22–24.

In his Executive Order, the President set forth his findings that steel is an indispensable component of substantially all the weapons used by the armed forces, that it is indispensable in carrying out the programs of the Atomic Energy Commission, and that a continuing and uninterrupted supply of steel is indispensable for the maintenance of the civilian economy of the United States upon which our military strength depends (R. 6–9). He concluded with the finding that

> a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field

and that in order to avert these dangers it

> is necessary that the United States take possession of and operate the plants, facilities and other properties of [the plaintiffs].

The affidavits filed below by petitioner, which were not controverted, spell out in greater detail these findings of the President. Secretary of Defense Lovett, the cabinet officer most directly concerned with all problems of armed forces

procurement and development, points out, in his affidavit, the following (R. 27–31): That an adequate and continuing supply of steel is essential to every phase of our defense production effort at home, including the ever increasing needs of troop training; that a continuing steel supply is essential to the effectiveness, safety and very existence of the armed forces fighting in Korea and stationed elsewhere overseas as part of our effort in world defense; and that no cessation of steel production can fail to add materially to the risk, from a military point of view, to which we are already subject by reason of the "stretch out" of our armament program and as a result of which we are barely able to meet our defense goals. Secretary Lovett, after disclosing, to the extent permitted by the grave considerations of security which are involved in any information of this type, the large percentage of steel production which goes into current defense requirements, emphasized the almost unbelievable extent to which our entire combat technique depends on the fullest use and availability of industrial strength and the use of vastly improved weapons, by reason of which he stated that "we are holding the line [in Korea] with ammunition and not with the lives of our troops" (R. 30). From all of these factors, Secretary Lovett concluded that any curtailment in the production of steel, even for a short period of time, would im-

peril the safety of our fighting men and that of the nation.

Again, the grave effect of any interruption in steel production on the national safety and defense efforts is sharply emphasized in the affidavit of Mr. Gordon Dean, Chairman of the Atomic Energy Commission (R. 31–33).[4] Mr. Dean, referring to the current major expansion of construction facilities for the production of atomic weapons, points out that success is governed by the completion of the facilities construction program on schedule; that time has already been lost and must be recovered; that the most varied and unusual types of structural steel and stainless steel must be continuously available; that inventories of materials needed for such critical projects as development of A. E. C. construction sites are abnormally low; and that, consequently, any cessation of deliveries of steel will have the critical effect of causing an inability to step up the production of atomic weapons to the rate required to meet goals established by the President.

Mr. Henry H. Fowler, Administrator of the National Production Authority, deposes (R. 34–38) that the products of the iron and steel industry are indispensable in the manufacture of

[4] As indicated above, serious security problems are presented in furnishing any detailed information as to the effect of a cessation of steel production on defense production schedules and needs. This consideration is particularly apposite in the case of the Atomic Energy Commision.

military weapons and equipment and in the production of items required for defense-supporting programs such as those of the Atomic Energy Commission and the construction and expansion of power plants and of steel and aluminum facilities for production of railroad equipment, ships, machine tools and the like. He points out that the effect of a stoppage of steel production would vary according to inventories available to the manufacturers but in any event would quickly diminish the volume of output. Because of inventory shortages there would be an immediate slow-down in the manufacture of certain types of ammunition and with respect to certain essential programs of the Atomic Energy Commission, which is in short supply on certain vital specialty items. The production of anti-friction-bearings, mechanical power transmissions and aircraft fasteners would be quickly affected, resulting in the immediate curtailment and early shut-down of the production of aircraft, tanks and other military equipment. The same is true as to the production of air valves required for the production program of the Atomic Energy Commission. With respect to heavy power and electrical equipment, such as engines, turbines, motors, power transformers, the situation is similarly critical; shipment of such equipment would be discontinued within one to three weeks after a production stoppage and Mr. Fowler estimates that "even a one week's stoppage would cause as much as one

month's delay in the production of engines and turbines." This in turn would have serious effects upon the programs of the Atomic Energy Commission, the Navy's mine sweeper program and the power, aluminum and steel expansion programs. The production of electronic equipment used for military purposes also would be immediately and seriously affected, and any loss in this field would be irretrievable.

Secretary of Commerce Sawyer's affidavit (R. 49–59) discloses the critical impact which a major stoppage in steel production would have on the transportation programs of the Maritime Administration, the Civil Aeronautics Administration, and the Bureau of Public Roads. He points out that a ten-day interruption in steel production would result in the loss of 96,000 feet of bridge and 1,500 miles of highway, that a twenty-day interruption would result in the loss of 149,000 feet of bridge and 2,280 miles of highway, and that a thirty-day interruption would result in the loss of 196,000 feet of bridge and 2,950 miles of highway; that the highway construction program, vital in defense plant and training areas, cannot continue production from inventory, and that steel for highways and bridges is ordered for specific use, delivered for specific use, and if it is not produced and delivered the program is delayed. With respect to the effect of a steel shutdown on the shipbuilding program, Secretary Sawyer states that of the 98 ships currently in

varying degrees of construction, there is sufficient steel in the yards to permit completion of only 21 of the ships, and that 39 ships are in such a stage of construction as to be directly dependent on the receipt of steel products during the present quarter. Further, Secretary Sawyer details the critical effect which a stoppage of steel production would have on the production of carrier and noncarrier aircraft. He emphasizes, with respect to production of transport type aircraft that should the production of certain components be delayed, it is anticipated that both the Convair and Douglas production lines would have to be stopped within 60 days; and that one manufacturer of aircraft has indicated that it would be preferable to close down his operations immediately rather than wait for the anticipated unavailability of a number of items to cause him to close.

Mr. Oscar L. Chapman, Secretary of the Interior, points out in considerable detail in his affidavit (R. 39–43) the drastic repercussions of any delay in deliveries of the various types of steel permitted by Defense Production Administration allotment orders to the petroleum, gas, and electric power utility fields. Most of the steel and steel products thus allocated are for maintenance and expansion of facilities for production and transportation, areas of activity which are obviously of the greatest importance not only for industrial use and expansion but for direct military use.

The factors involved in these considerations are elaborated in Mr. Chapman's affidavit. In addition, he sets forth the crucial importance of the continued availability of steel supplies for the maintenance, repair, and operation of coal mines and coke ovens. Failure of steel supplies would result in curtailment of power production necessary for defense and military uses and would also result in a progressively severe decline in the production and availability of coal for all purposes.[5]

3. COURT PROCEEDINGS

Immediately upon the issuance of Executive Order 10340, plaintiffs sought, by court order, to nullify the Presidential action thus taken to prevent the complete cessation of production in the steel industry.[6] On the night of April 8, 1952, applications for temporary restraining orders

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[5] Further details of the impact upon our national security of a cessation of steel production are contained in the affidavits of Manly Fleischmann, Administrator of the Defense Production Authority (R. 33–34), Homer C. King, Acting Administrator of the Defense Transportation Administration (R. 46–48), and Jess Larson, General Services Administrator (R. 44–46).

[6] Counsel for plaintiff Republic Steel Company advised the District Court that the plaintiffs produce 70% of the nation's steel (R. 291). In addition, a complaint making similar allegations has been filed by Inland Steel Company in the Northern District of Indiana, Hammond Division, Civil Action No. 1381, filed April 16, 1952. That action has been stayed by agreement pending disposition of the present cases.

were presented ex parte to Judge Bastian of the District Court for the District of Columbia. The Judge declined to take action without some notice to the Government, which notice was given on the morning of April 9. At 11:00 a. m., April 9, a hearing was held before Judge Holtzoff (R. 217–266). At the conclusion of the hearing, the applications for temporary restraining orders were denied (R. 128).

Briefly summarized, the complaints (R. 1, 80, 116, 134, 144, 154, 167) filed by the companies pray for declaratory judgment and injunctive relief, narrate the expiration of the wage agreement between plaintiffs and the union, the unproductive negotiations for a new contract, and the strike call of the steel-workers for April 9, 1952. They then allege the issuance of Executive Order No. 10340 (17 F. R. 3139) authorizing and directing Secretary Sawyer to seize the steel industry, and that Secretary Sawyer, in compliance with this order, has seized the steel industry. Plaintiffs aver that this seizure is illegal for want of any constitutional or statutory authority in the President to issue the Executive Order.

Plaintiffs conclude that the seizure of their plants constitutes an illegal invasion of their property rights, which exposes them to injuries for which monetary damages would afford inadequate compensation. The allegations of irreparable harm vary to some extent but center

around the apprehension that the seizures might interfere with plaintiffs' normal customer relations and destroy their good-will, that Secretary Sawyer might make improper use of plaintiffs' trade secrets, might place incompetent management in the plants which would wreck them physically and financially, and finally, that Secretary Sawyer might put into effect the recommendations of the Wage Stabilization Board as to wage increases or union security.

On April 24 and 25, 1952, hearings were held in the District Court before Judge Pine on plaintiffs' motions for preliminary injunctions seeking to restrain petitioner from taking any action under the authority of Executive Order No. 10340 (R. 217–439). Judge Pine announced his opinion and granted the motions on April 29, 1952 (R. 63–76).[7] Formal orders were signed on April 30, 1952, and applications for stay were denied by Judge Pine (R. 76, 79). Notices of appeal were filed by petitioner on the same day in the Court of Appeals for the District of Colum-

[7] At the hearing, plaintiff United States Steel orally modified its request for an injunction so as to pray only that Secretary Sawyer be restrained from making any changes in the terms and conditions of employment (R. 76). The affidavit of John A. Stephens, principally relied upon to show irreparable injury, was filed at the hearing in connection with this oral motion (R. 99–111). This modified request was denied by Judge Pine (R. 76).

bia Circuit and the appeals were docketed (R. 77, 428). Later that day, the Court of Appeals, *en banc,* issued an order staying the orders of the District Court until 4:30 P. M. Friday, May 2 (two days later) and if petition for certiorari were filed by that time, until this Court acted upon the petition for a writ of certiorari; and, if the petition were denied, until further order of the Court of Appeals (R. 444). On May 1, 1952, that Court, *en banc,* denied applications to modify its stay (R. 446). On May 2, 1952, the Court of Appeals filed an opinion in connection with the action taken by it on April 30 and May 1 (R. 447–449). On May 3, 1952, this Court granted certiorari and ordered a further stay pending disposition by this Court, with the provision that Secretary Sawyer "take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies and the bargaining representatives of the employees" (R. 457).

4. EVENTS SUBSEQUENT TO SEIZURE

A. CONGRESSIONAL ACTIVITY

As an integral part of the action involved in seizure of plaintiffs' properties, the President, on the morning following the issuance of the Executive Order, dispatched a message to Congress.[8] After reviewing the crisis which faced the

[8] House Doc. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962–3963, April 9, 1952.

Nation on the night of April 8, the President stated that "the idea of Government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible" but that, after canvassing the available alternatives, he had concluded that "Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open." The President suggested various courses of action which Congress might deem desirable and stated that he "would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider." On April 21, 1952, the President sent a further communication to the Senate (98 Cong. Rec. 4192) in which he reiterated these statements. He further stated:

> I also indicated that, if the Congress wished to take action, I would be glad to cooperate in developing any legislative proposals the Congress might wish to consider. That is still my position. I have no wish to prevent action by the Congress. I do ask that the Congress, if it takes action, do so in a manner that measures up to its responsibilities in the light of the critical situation which confronts this country and the whole free world.
>
> I do not believe the Congress can meet its responsibilities simply by following a course of negation. The Congress cannot perform its constitutional functions simply

by paralyzing the operations of the Government in an emergency. The Congress can, if it wishes, reject the course of action I have followed in this matter. As I indicated in my message of April 9, I ordered Government operation of the mills only because the available alternatives seemed to me to be even worse. The Congress may have a different judgment. If it does, however, the Congress should do more than simply tell me what I should not do. It should pass affirmative legislation to provide a constructive course of action looking toward a solution of this matter which will be in the public interest.

Since April 9, there has been no definite or completed legislative response to the various suggestions made by the President in his message. One legislative proposal, S. 2999, introduced by Senator Morse on April 9, contained a broad and new procedure for seizure in the form of an amendment to the Labor Management Relations Act of 1947. A second bill, S. 3016, was introduced by Senator Morse on April 16, proposing a return of the mills to private owners upon acceptance of the recommendations of the Wage Stabilization Board or, alternatively, authorizing Secretary Sawyer to make those recommendations effective under his supervision. On the same day, a study by the Senate Judiciary Committee of the seizure problem was proposed. S. Res. 306. Hearings have been held before the Senate

Committee on Labor and Public Welfare and before a Special Subcommittee of the Senate Judiciary Committee. There has also been extensive debate in both Houses on an almost daily basis. In addition to these proposals, there has been a flurry of bills and resolutions utilizing various parliamentary devices.[9] Three amendments to specific appropriation bills, designed to prevent use of appropriated funds for acquiring or operating any facility whose seizure is not authorized by act of Congress, were favorably voted on in the Senate and are presently in conference. Sec. 403, H. R. 6854, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4617; Sec. 707, H. R. 7151, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4626; Sec. 1305, H. R. 6947, passed Senate as amended on April 22, 1952, 98 Cong. Rec. 4267. On April 22, the day

[9] See H. R. 7449, introduced on April 8, 1952; H. Con. Res. 207, introduced on April 9, 1952; H. Res. 604, introduced on April 22, 1952; H. Res. 605, introduced on April 22, 1952; H. Con. Res. 209, introduced on April 22, 1952; H. Con. Res. 210, introduced on April 22, 1952; H. J. Res. 431, introduced on April 22, 1952; H. Res. 607, introduced on April 23, 1952; H. R. 7572, introduced on April 24, 1952; H. R. 7579, introduced on April 24, 1952; H. Res. 609, introduced on April 24, 1952; H. Res. 610, introduced on April 24, 1952; H. J. Res. 433, introduced on April 24, 1952; H. R. 7622, introduced on April 28, 1952; H. Res. 614, introduced on April 28, 1952; H. R. 7647, introduced on April 30, 1952; H. R. 7697 and 7698, both introduced on May 1, 1952; H. J. Res. 441, introduced on May 1, 1952; H. J. Res. 442, introduced on May 1, 1952; H. Res. 627, introduced on May 1, 1952; S. 3106, introduced on May 5, 1952.

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following Senate action amending the Third Supplemental Appropriation Bill for 1952 in this fashion, an effort to extend the prohibition to cover the use of any funds for expenditure during the fiscal year 1952 to implement any seizure unauthorized by Act of Congress, failed. 98 Cong. Rec. 4258–4261, April 22, 1952.[10]

B. COURSE OF NEGOTIATIONS

Immediately after the seizure of plaintiffs' properties, the President directed the Acting Director of Defense Mobilization, Dr. John R. Steelman, to arrange a meeting of representatives of the companies and the steel workers at the earliest possible date for a renewed attempt to settle the dispute.[11] The next day, the Acting Director of Defense Mobilization met with negotiators for the steel workers and the major steel companies.[12] During these negotiations, the President of the United Steelworkers of America, CIO, reiterated his telegraphic undertaking of the night of April 8. of union cooperation in

[10] In considering this legislative activity, mention might be made of a cautionary provision inserted in the Emergency Powers Interim Continuation Act, Pub. L. 313, 82d Cong., 2d Sess., 66 Stat. 54, April 14, 1952. Section 5 of that statute provides: "Nothing contained herein shall be construed to authorize seizure by the Government, under authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities." In making the present seizure the President did not rely on any of the Acts thus extended.

[11] N. Y. Times, April 9, 1952, p. 1, col. 8.

[12] N. Y. Times, April 10, p. 1, col. 8.

continued production of steel.[13] The National Production Authority subsequently revoked orders freezing and controlling the delivery of steel for consumer goods and for export. 17 Fed. Reg. 3235.

The President indicated again, on April 10, his desire that negotiations continue between the companies and the union.[14] Such negotiations, conducted under the supervision of Dr. Steelman, terminated on April 15 (R. 95). At his request, representatives of both the steel workers and the operators conferred with Secretary Sawyer on April 18, but a basic disagreement persisted on major issues, including the question of price increases for the companies, and Secretary Sawyer abandoned plans for convening a final joint meeting.[15]

After the failure of these negotiations, Secretary Sawyer indicated that he felt that he should, under the instructions of the President, undertake consideration of arranging appropriate terms and conditions of employment, although he stressed that the revelation of his intentions on this matter was not intended to serve as an ultimatum to the parties and that it should not be so interpreted.[16]

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[13] N. Y. Times, April 11, p. 15, col. 3.
[14] N. Y. Times, April 11, p. 1, col. 8.
[15] N. Y. Times, April 19, p. 1, col. 8.
[16] N. Y. Times, April 21, p. 1, col. 8, p. 22, col. 3.

A further effort to encourage a settlement of the dispute by the companies and workers was made when the Economic Stabilization Administrator instructed the Director of Price Stabilization to perfect procedures for permitting price increases for the steel companies under the Capehart Amendment, Section 402 (d) (4), Defense Production Act of 1950, as amended, 50 U. S. C. A. App. Section 2102 (d) (4), issuance of which had been delayed at the request of the steel industry (R. 396). Simultaneously, Secretary Sawyer released for publication a letter to the Economic Stabilization Administrator requesting recommendations, for submission to the President, concerning appropriate terms and conditions of employment for the steel workers (R. 395).

Steel production continued at a high level during the seizure.[17] However, immediately following the announcement of the district court's opinion, the union called its men out and the production stoppage, which the President sought to avert, began.[18] During the subsequent short period of uncertainty, the steel companies and union leaders took no action on proposals by the Government that collective bargaining be resumed.[19]

On May 2, after an urgent message from the President, and Judge Pine's order having been stayed for the second time, the union cancelled

[17] N. Y. Times, April 28, p. 28, col. 1.
[18] N. Y. Times, April 30, p. 1, col. 6–7, p. 20, col. 1.
[19] N. Y. Times, May 2, 1952, p. 1, col. 6–7–8.

its strike although several of the large steel companies announced unwillingness to resume production unless assurances were given that no further interruptions in work schedules would occur.[20] These companies subsequently indicated that they were undertaking a full resumption of operations on May 3.[21]

On May 2, the President sought personally to foster agreement between the companies and the workers and announced a conference to be held at the White House beginning on the morning of Saturday, May 3.[22] These conferences continued until the afternoon of Sunday, May 4, when they collapsed.[23] Although no agreement could be concluded, the union announced that it would continue efforts to maintain production and the manufacture of steel appears to be continuing without interruption pending the arguments in this case.[24]

ARGUMENT

INTRODUCTION

SUMMARY OF POSITION

The two issues in this case are (1) whether the district court properly granted injunctive relief in view of the great and urgent public inter-

[20] N. Y. Times, May 3, p. 1, col. 8.
[21] N. Y. Times, May 4, p. 1, col. 7.
[22] N. Y. Times, May 2, p. 1, col. 8.
[23] N. Y. Times, May 5, p. 1, col. 8.
[24] N. Y. Times, May 5, p. 1, col. 8; N. Y. Times, May 6, p. 22, col. 8.

ests which impelled the President's decision to seize the steel mills for the purpose of maintaining uninterrupted steel production; and (2) whether on the facts which the President found in the Executive Order, and which are established by uncontroverted affidavits, the President had power under the Constitution and laws to take possession of the plaintiffs' steel mills in order to avert an imminent nation-wide cessation of steel production.

We contend that the granting of injunctive relief by the district court was in clear violation of the applicable equitable principles. Plaintiffs had an adequate remedy at law by suit for just compensation in the Court of Claims. The formal concession of Government counsel, thrice-repeated, that such a suit may be brought and that no defense of lack of jurisdiction can or will be raised should, as a practical matter, be sufficient. *International Paper Co.* v. *United States,* 282 U. S. 399, 406. But in any event, such a suit could be maintained, either on the ground that where, as here, statutory warrant existed for a taking, just compensation will be allowed even though the particular procedures prescribed were not followed, *Hurley* v. *Kincaid,* 285 U. S. 95, or on the ground that wherever there has been an actual physical taking and where the Constitution directs that compensation be paid, the Court of Claims will entertain jurisdiction, at least where

the action was taken under a formal executive regulation.

Moreover, we think it quite doubtful whether the plaintiffs will suffer any damage, while it is certain that vital public interests will be damaged, and the lives, liberties and property of all the people will be put in jeopardy by the issuance of an injunction. Under such circumstances, it is clear that the application for preliminary injunction should have been denied on a balancing of the equities, without reaching the constitutional issues involved. *Yakus* v. *United States,* 321 U. S. 414, 440. And even final relief should be denied in the absence of a "clear showing" that equitable relief is necessary. *Hurley* v. *Kincaid, supra,* 104n. These principles are especially applicable to constitutional cases. Such cases will, if it is at all possible, be disposed of on non-constitutional grounds; a court will "undertake the most important and the most delicate of the Court's functions" only if "necessity compels it" to do so. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 569.

On the constitutional issue we contend that under Article II of the Constitution the President possessed power to seize the steel mills to avoid a cessation of steel production which would gravely endanger the national interests which it is his duty to protect. Specifically, we find such authority in the provisions of Article II, that "the executive Power shall be vested in a President of

the United States" (Section 1); that the President shall swear that he will "faithfully execute the Office" and will to the best of his ability "preserve, protect and defend the Constitution of the United States" (Section 1); that he "shall be Commander-in-Chief of the Army and Navy of the United States" (Section 2); that he shall be the sole organ of the Nation in its external relations (Sections 2 and 3); and that "he shall take Care that the Laws be faithfully executed" (Section 3).[25] In a subsequent part of this brief, we shall show from 150 years of American history that the President may act as he did under the conditions in which he did. We shall show further that no statutory enactment even purports to deprive him of the power so to act.

Underlying both sets of issues, however, are the circumstances in which the President acted. None of the questions here presented can be considered in the abstract. In particular, an understanding of the nature of the emergency to which the President's action was addressed is necessary to consideration of the question whether, upon a balancing of the equities, the enormous damage to vital public interests which might result from the granting of an injunction should lead a court of equity to stay its hand. It is equally necessary to a consideration of the constitutional issues.

[25] There are other provisions in the Constitution, which, although not constituting specific grants of power to the President, confer powers on him by implication. For example, Article IV, Section 4 guarantees every State against domestic violence.

For "while emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426. Accordingly, we shall at the outset describe the national interests which the President sought to protect and the gravity of the injury to those interests which impelled him to act.

THE NATURE OF THE EMERGENCY

In his Executive Order, the President has made the following factual findings (among others):

> WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and
>
> WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and
>
> WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and
>
> WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the

United States, upon which our military strength depends; and

* * * * *

WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

* * * * *

These findings by the President describe a serious emergency. They have not been challenged by the plaintiffs nor contradicted by any findings of the district court, even assuming that they would be open to such challenge. Accordingly, they must be accepted as true.

These findings make it clear that the President has not asserted the power to seize private property out of whim or caprice, or with some vague idea that such an act would promote the general prosperity or well-being of the country. In this case, the President found that seizure of the steel plants was "necessary" to avert a work stoppage in the steel industry with the attendant cessation of steel production which "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." The seizure of the steel mills for this stated purpose was in discharge of

the President's duty to take care that the laws be faithfully executed—the laws in this case being a comprehensive scheme of statutes and treaties establishing and implementing the national policy to deter and repel aggression. Such seizure was also necessary to the effective discharge of the President's responsibilities as Commander in Chief of the armed forces and as the representative of the nation in foreign affairs.

The Military and Foreign Affairs Crisis.—The absolute necessity for continuous steel production which led to the President's seizure of the steel plants on April 8 arises from the fact that the military security of the United States and other countries is endangered by the aggressions of the Soviet Union and its satellite states.

Within a few years after World War II, the Soviet Union had succeeded in annexing Lithuania, Latvia and Esthonia, and in establishing in Poland, Rumania, Hungary, Bulgaria, and Czechoslovakia regimes which completely subordinated the interests of those countries to the interests of the Soviet Union. Similar threats to the independence of Greece and Turkey were averted only through American military and economic aid extended pursuant to the Greek and Turkish Assistance Act of May 22, 1947 (61 Stat. 103). Also, Soviet attempts to exploit the temporary weakness of the devastated nations of Western Europe were a large factor in the establishment of the European Recovery Program under which Amer-

ican economic aid was used to assist those countries in repairing and expanding their economies (62 Stat. 137). Iran maintained its territorial integrity in the face of Soviet aggression only through the efforts of the United Nations.

In 1949, the United States and most of the nations of western Europe decided that a program of economic rehabilitation was not enough. On April 4, 1949, there was signed the North Atlantic Treaty, under Article 5 of which the United States and the other signatory nations

> * * * agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[26]

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[26] The Senate ratified the North Atlantic Treaty in July 1949. The original North Atlantic Treaty of April 4, 1949, 63 Stat. 2241, includes, besides the United States, as parties the following: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom. The scope of the treaty has been extended to include Greece and Turkey. S. Doc. Executive E, 82nd Congress, 2d session.

Congress has implemented the North Atlantic Treaty with the Mutual Defense Assistance Act of 1949, 63 Stat. 714, in which the Congress declared:

> * * * that the efforts of the United States and other countries to promote peace and security in furtherance of the purposes of the Charter of the United Nations require additional measures of support based upon the principle of continuous and effective self help and mutual aid. * * *

In 1951, this was succeeded by the Mutual Security Act of 1951 (Public Law 165, 82d Cong., 1st Sess.) the stated purpose of which is

> to maintain the security and to promote the foreign policy of the United States by authorizing military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world, to develop their resources in the interest of their security and independence and the national interest of the United States and to facilitate the effective participation of those countries in the United Nations system for collective security.

The mutual security program has involved appropriations of approximately $13 billion for the two fiscal years ending June 30, 1952. In fulfillment of the North Atlantic Treaty, the United States has stationed in western Europe, without

regard to the approaching end of the German occupation, the equivalent of six divisions plus certain naval and air units. Joint command arrangements, unprecedented except in time of war, have been made by the United States and its west European allies, with General Eisenhower as the first Commander.

More recently, the United States has entered into defense and security pacts with the Republic of the Philippines, Australia, New Zealand and Japan.[27] These agreements are intended to provide the basis for effective mutual defense in the Pacific area.

The Soviet Union has maintained since World War II ground forces much larger than those presently available to the United States and the countries joined with it in mutual security arrangements. In addition, the Soviet Union has maintained the largest air force in the world. In general, the Soviet Union has consistently devoted a much larger portion of its industrial production to military items than has any other country. In the years immediately following World War II, it was widely believed that the United States' exclusive possession of atomic weapons constituted a powerful deterrent to Soviet aggression. However, in 1949, the Soviet Union produced an atomic explosion.

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[27] Senate Documents Executives B, C and D, 82d Cong., 2d Sess. See also Charter of Organization of American States, Executive A, 81st Cong., 1st Sess.

With the sudden and unprovoked attack of North Korean Communist forces upon the Republic of Korea on June 25, 1950, the United Nations, including the United States, were confronted with naked armed aggression. On June 25, 1950, the United Nations Security Council determined that the North Korean attack "constitutes a breach of the peace," [28] On June 26, the President declared that "In accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace." On June 27, the Security Council recommended "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." [29] On the same day, the President announced that "In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support." [30] On June 30, it was announced that the President "had authorized the United States Air Force to conduct missions on specific military targets in Northern Korea wherever militarily necessary and had ordered a Naval blockade of the entire Korean coast. General MacArthur had been an-

[28] *United States Policy in the Korean Crisis* (1950), Department of State Publication 3922, p. 16.

[29] Ibid., p. 24.

[30] Ibid., p. 18.

thorized to use certain supporting ground units."[31] By its resolution of July 7, 1950, the Security Council recommended the creation of a unified command for the military forces of member states assisting in the defense of the Republic of Korea, and requested the United States to designate a commander.[32]

As a result of these events, and pursuant to the decisions of the Security Council, the United States and other members of the United Nations, under the command of General MacArthur and later General Ridgway, have engaged in nearly two years of military operations to preserve the independence of the Republic of Korea. This task was greatly increased by the large-scale intervention of Chinese Communist forces in November 1950.[33] In addition, the Communist forces in Korea have been and are being steadily supplied by the Soviet Union with such items as military aircraft, tanks, guns and radar. The present situation in Korea is one in which the territorial integrity of the Republic of Korea has been substantially maintained, and there exists an uneasy and limited military truce during which negotiations for an armistice have been carried on without success since July 1951. The total casualties

[31] Ibid., pp. 24–25.

[32] Ibid., p. 66.

[33] On February 1, 1951, United Nations General Assembly branded the Chinese Communist intervention as an aggression. UN doc. A/1771.

in the United Nations forces to date are unofficially estimated to exceed 300,000, of which the American casualties are over 108,000. It is roughly estimated that resistance to Soviet aggression in Korea has cost the United States directly about 10 billion dollars.

As Ambassador Austin stated on April 21, 1951, "[The Korean conflict] has alerted people all over the world to the imminent dangers of Soviet aggression." In the domestic life of the United States, these grave events have evoked measures of control and partial mobilization unprecedented except in time of declared war. On December 16, 1950, one month after the Chinese Communists attacked the United Nations forces, the President proclaimed "the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."[34] The armed forces of the United States have been substantially increased, necessitating large-scale inductions pursuant to the Selective Service Act of 1948 and the recall of thousands of reservists. Congress has appropriated for our defense program, for

[34] 15 F. R. 9029.

our armed forces and for military assistance to our allies since the beginning of military operations in Korea in excess of $130 billion. Recognizing the impact of such expenditures upon our economy, Congress in the Defense Production Act of 1950, as amended, provided for price and wage controls, allocation of materials, requisitioning powers and credit controls which are equally without peacetime precedent.

In fulfillment of the North Atlantic Treaty and the other security pacts to which the United States is a party, and the implementing acts of Congress, the United States has made many agreements with its allies which call for American economic and military aid to assist those countries to participate in effective mutual security arrangements to deter or repel aggression.

In brief, a world still suffering from the devastation of World War II is confronted by an aggressive Soviet Union commanding massive armaments. The attack upon Korea has demonstrated the willingness of the Soviet Union and its satellites to employ military force for conquest. The United States and the other free nations of the world have resolved that the only hope of deterring aggression and thereby avoiding subjugation or, at the best, a great war, is to place themselves in a military posture which will make military adventures too dangerous. They have also resolved to repel any aggression

which may be attempted. The United States is therefore carrying on an unprecedented program to rearm itself and to assist other countries to rearm for these purposes. More than ever before, we are the arsenal of the free world. More immediately, we must continue to produce and deliver military supplies to the United Nations forces in Korea who have been fighting Soviet aggression for two years, and to the NATO forces in Europe who must maintain a constant state of readiness against potential aggression.

Steel and defense.—In this context of military necessity, the President found that any interruption in the production of steel would endanger the security of the United States, its armed forces abroad, and its allies. The Nation's critical need for such continuous production is set forth in uncontradicted affidavits filed with the district court. In addition, we shall refer to certain information from reliable official sources. To a considerable extent, considerations of security require that the consequences of a cessation of steel production be described in only general terms.

Steel is the "basic commodity involved in the manufacture of substantially all weapons, munitions, and equipment produced in the United States" (R. 29). The Administrator of the Defense Production Administration states that "The total supply of steel normally available to the United States is substantially less than the esti-

mated requirements of defense and civilian production" (R. 33). The Administrator of the National Production Authority states that "In the month of February 1952, the total tonnage of iron and steel products shipped by the iron and steel industry for all uses was approximately 6,400,000 tons, of which it is estimated that 936,000 tons [or nearly 15%] were shipped for direct Department of Defense and Atomic Energy Commission uses" (R. 35).[35] A more accurate index of the defense needs for steel appears in a breakdown of particular types of steel. Thus, Secretary of Defense Lovett states that, "We are now using, for production of military end items (guns, tanks, planes, ships, ammunition and other military supplies and equipment), the following percentages of our total national steel production:

Carbon Steel	13.5 percent
Alloy Steel	36.6 percent
Stainless Steel	32.4 percent
Super alloy Steel	84.0 percent

(R. 29). To illustrate "the crisis which a steel shut-down would produce", Secretary Lovett stated that "35 percent of national production of one form of steel is going into ammunition for the use of our armed forces and 80 percent of such ammunition is going to Korea" (R. 30). Recognizing that even without a cessation of steel

[35] Preliminary figures for the month of March 1952 indicate that shipments of these products for all uses amounted to approximately 6,950,000 tons, of which it is estimated that 1,044,000 were shipped for direct use of the Department of Defense and the Atomic Energy Commission.

production there are shortages in certain types of steel, Secretary Lovett pointed out that "Another specific example of a critical shortage is in stainless steel. Fifteen percent of all stainless steel produced in the United States is used in the manufacture of airplane engines, including jets. No jet engine can be manufactured without substantial quantities of high-alloy steels" (R. 30). Secretary Lovett further states that "the fire power of an infantry division is 50 percent greater today than it was in World War II. We have substituted, insofar as possible, such fire power for man power. Our combat techniques are designed to employ the industrial strength of the United States by the increased use of matériel so as to preserve and protect to the maximum extent possible the lives of our men." From these facts, Secretary Lovett concludes that "A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue, it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the Nation" (R. 31).

Shortly after the first atomic explosion in the Soviet Union in 1949, the President and Congress determined upon a tremendous expansion of the atomic weapons program. The Atomic Energy Commission was directed, among other things, to

proceed with work upon the hydrogen or fusion bomb. The Chairman of the Atomic Energy Commission states that "This expansion program includes the construction of major facilities at Savannah River, South Carolina; Paducah, Kentucky; Fernald, Ohio; and other places" (R. 31). The scope of the Commission's expanded activities may be measured by the fact that during the fiscal years 1951 and 1952 Congress has appropriated $3,638,000,000 for the Atomic Energy Commission.

The Chairman of the Atomic Energy Commission further states that (R. 32):

> The requirements of AEC's construction projects include virtually all types and kinds of steel including special forms of structural steel for buildings and substantial quantities of stainless steel for process equipment. These requirements include steel for structures and specially fabricated equipment and also for such items of specialized and standard manufacture as pumps, valves, compressors, heat exchangers, piping, heavy electrical equipment, tanks, and the like.
>
> Inventories of steel and other critical products at the AEC construction projects are generally abnormally low for projects of such magnitude. Consequently, any cessation of deliveries of steel to the sites of AEC construction projects or to the manufacturers of equipment for such projects is

> likely to result in delays in the completion of these projects. * * *
>
> * * * * * *
>
> The ultimate effect of delayed completion of production facilities will inevitably be reflected in AEC's inability to step up the production of weapons to the rate required to meet the goals established by the President.

In the construction of AEC facilities, as in the manufacture of certain conventional military weapons, it is often necessary to use special alloys and shapes of steel, thus precluding either stockpiling or the utilization of miscellaneous steel inventories.

The Administrator of the National Production Authority points out that the immediacy of the impact of a cessation of production upon the production of weapons cannot be determined from aggregate steel inventories. The lack of a single alloy or shape of steel may completely stop the deliveries of an arms manufacturer who has material for every other part. This condition would be aggravated by the fact that there are already critical shortages of certain types of steel (R. 35–38).

The uncontradicted affidavits submitted by the Government reveal that a halt in steel production for any substantial period of time would have other far-reaching effects upon the military security of the Nation. Thus, the Congress and

the President have determined that American industrial capacity must be substantially increased to support the requirements of a global conflict—if one is forced upon us. This policy is evidenced in the provisions of Title III of the Defense Production Act for government encouragement of industrial expansion and in the statutory provisions for accelerated tax amortization of the cost of new productive facilities "necessary in the interest of national defense" (64 Stat. 939). The scope of this program may be gauged by the facts that as of February 29, 1952, the Government had guaranteed $1.5 billion in private loans under Title III, while as of April 15 certificates for accelerated tax amortization had been issued for expansion projects totalling $18.4 billion. The Administrator of the National Production Authority states that an interruption of steel production "would seriously impede certain construction programs required to support the mobilization effort including facilities for the production of aluminum, steel, certain essential chemicals, urgently needed metal-working equipment, particularly machine tools, and aircraft, ships, tanks, guns, shells and guided missiles. These construction projects will require a total of approximately 1,000,000 tons of steel for completion. All of these projects have a high degree of priority and any delay in completing

them would set back the production schedules of military products urgently needed in the mobilization effort." (R. 38.) It should be noted that there has been a substantial and urgent need for steel with which to increase steel making capacity, as indicated by the fact that certificates for accelerated tax amortization have been issued with respect to an expansion of steel production facilities to cost approximately $3,200,000,000.

We have pointed out the effect of a cessation of steel production upon the military security of the United States. It would have identical effects upon the other countries which have joined with us to deter or repel Soviet aggression. For example, under the North Atlantic Treaty and the implementing legislation, the United States has entered into commitments with its allies to assist their rearmament programs. This assistance takes several forms—all involving large amounts of steel. Substantial amounts of military equipment have been and will be sent to those countries. During the 23 months ended February 29, 1952, the United States under the mutual aid program, delivered 2,577,200 tons of military equipment.[36] Also, the United States assists these west European countries to produce arms themselves by delivering to them both machine tools and certain types of steel. For exam-

[36] Hearings before the Senate Committee on Foreign Relations on a bill to amend the Mutual Security Act of 1951, 82d Cong., 2d Sess., p. 361.

ple, the United Kingdom has placed orders here for over $100 million of machine tools, most of which are still in production. Any stoppage in the delivery of steel to machine tool makers in the United States would have a heavy impact upon the British jet engine and tank production programs.[37] Similarly, during this past winter the United States agreed to allocate 1,000,000 tons of steel to the United Kingdom during 1952, in recognition of the fact that without such steel imports the United Kingdom would be forced to curtail its own military production.

To summarize the current relationship of steel production to the military and foreign affairs interests of the United States in the words of the President's Executive Order, "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." He acted to insure an uninterrupted flow of arms to United Nations forces who already have been repelling Soviet agression in Korea and who must ever be prepared to deal with an all-out attack. He acted to insure the continuous build-up of American armed strength. He acted to insure the fulfillment of our commitments to assist our allies to

[37] For an example of the value of such tools to the British defense program, see *op. cit.* n. 36, p. 566.

resist aggression. Failure to act as he did might well have meant "too little, too late".

We have shown that uninterrupted production of steel is absolutely essential if the President is to insure the safety and efficiency of American troops in Korea and elsewhere and if he is to fulfill our commitments to our allies. He seized the steel mills to carry out those objectives. It is true that the President and other executive officers might possibly have insured continued production of steel otherwise than by seizing the steel mills. Specifically, if they had granted the substantial increase in maximum ceiling prices for steel which the plaintiffs were interested in securing, the plaintiffs and the union might have reached an agreement that would have prevented a strike. In his Message to the Congress on April 9, 1952, the President stated:

> "The only way that I know of, other than Government operation, by which a steel shut-down could have been avoided was to grant the demands of the steel industry for a large price increase. I believed and the officials in charge of our stabilization agencies believed that this would have wrecked our stabilization program. I was unwilling to accept the incalculable damage which might be done to our country by following such a course.
>
> Accordingly, it was my judgment that Government operation of the steel mills

> for a temporary period was the least undesirable of the courses of action which lay open. In the circumstances, I believed it to be, and now believe it to be, my duty and within my powers as President to follow that course of action.

The inflationary effects of huge defense expenditures upon our economy need no elaboration. To minimize and control them, Congress provided in Title IV of the Defense Production Act for price and wage controls and entrusted their administration to the President or his delegate. There is not presented in this case any question as to what price increase for steel, if any, would follow an increase in labor costs in the steel industry. The price standards under the Defense Production Act are not here in issue. Indeed, the administrative and judicial review procedures prescribed by the Act for challenging the validity or application of those price standards have not yet been invoked. All that is involved here is the fact that the President determined that to grant the substantial price increase desired by the plaintiffs would scuttle the Nation's stabilization program. Taking into consideration both his obligation to insure the military security of the United States and its armed forces by maintaining steel production, and his obligation to carry out the national stabilization policy expressed in the Defense Production Act, he determined that he could effectuate both of these basic national policies only by seizing and operating the steel mills.

Given conditions under which a cessation of steel production will endanger immediately the military security of the Nation, its armed forces and its allies, we believe the President's power under the Constitution to avert such danger by seizing and operating the steel mills is not lost merely because production might possibly have been maintained by acquiescing in price increases which in his judgment would endanger the national economy. Here, as in *Hirabayashi* v. *United States*, 320 U. S. 81, 93, such "* * * conditions call for the exercise of judgment and discretion and for the choice of means * * *" by the President in the exercise of his constitutional power and duty to meet national emergency.

I

THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION

INTRODUCTORY

Judge Pine, in the district court, rested his decision on a determination that Executive Order 10340 was beyond the constitutional authority of the President. Reversing normal procedure, he held that the issue of constitutional power "should be decided first." (R. 68). Only after deciding that the President had exceeded his constitutional power did he consider whether the plaintiffs had made a showing entitling them to equitable relief

(R. 74–75). And even then, he used his decision of the constitutional issues as a springboard from which to find a basis for equitable intervention,[38] concluding, upon his method of balancing the equities, that any injury to the public resulting from "the contemplated strike, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained power,[39] which would be implicit in a failure to grant the injunction." (R. 75).

In his haste to decide constitutional issues, Judge Pine departed from long-established standards of adjudication by failing to apply the principle that the courts will not pass on constitutional

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[38] Judge Pine stated (R. 74):

> As to the necessity for weighing the respective injuries and balancing the equities, I am not sure that this conventional requirement for the issuance of a preliminary injunction is applicable to a case where the Court comes to a fixed conclusion, as I do, that defendant's acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to the complaints are filed and the cases are at issue and are reached for hearing on the merits. Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached.

[39] We, of course, do not contend that the President has "unlimited and unrestrained" power. We contend only that in a situation of national emergency the President has authority under the Constitution, and subject to constitutional limitations, to take action of this type necessary to meet the emergency. See *infra*, pp. 91 et seq.

questions where the pending matter can be disposed of on non-constitutional grounds. "If two questions are raised, one of non-constitutional and and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. The same rule should guide the lower court as well as this one." *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129, 136–137. This rule has particular application in passing upon requests for preliminary injunction. *Mayo* v. *Canning Co.*, 309 U. S. 310. Here the immediately dispositive non-constitutional issues were (1) whether the plaintiffs had an adequate remedy at law, and (2) whether, assuming they did not, they could demonstrate that they would suffer irreparable injury which would outweigh the uncontroverted injury to the public interest from the grant of an injunction.

The judicial policy of refraining from deciding constitutional issues "unless absolutely necessary to a decision of the case," *Burton* v. *United States*, 196 U. S. 283, 295, is a rule derived from "the unique place and character, in our scheme, of judicial review of governmental action for constitutionality". *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 571. The foundations of the policy rest

> in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional

> roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system. [*ibid.*]

The issues here touch, moreover, on one of the most delicate problems of our constitutional system—the basic implications of the doctrine of separation of powers. The President has disclaimed any intention to resist the process of the courts should it issue; he has publicly stated that he will abide by the decision of this Court, whatever that decision may be. N. Y. Times, May 2, 1952, p. 1. Nevertheless, we suggest that the courts should consider the inappropriateness of issuing what is in effect a mandatory injunction to the President.[40] At least, the diffi-

[40] This Court in *Mississippi* v. *Johnson*, 4 Wall. 475, 498, held unanimously that the President cannot "be restained by injunction from carrying into effect an act of Congress alleged to be unconstitutional." Cf. *State ex rel. Burnquist* v. *District Court*, 141 Minn. 1; *Dakota Coal Co.* v. *Fraser*, 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8); *Holzendorf* v. *Hay*, 20 App. D. C. 576, writ of error dismissed, 194 U. S. 373; see also *Trial of Thomas*

culties implicit in issuance of such a decree afford a sound reason for denying the injunction sought on other grounds, if it is possible to do so.

Accordingly, the district court, for considerations of policy "transcending specific procedures," *Rescue Army* v. *Municipal Court, supra,* 571, should have refrained from reaching the constitutional issues if there was any other basis on which it was possible to dispose of the case. Similarly, adherence to well-settled practice dictates that this Court can reach the constitutional issues in this case only if it concludes that the usual equity requirements for issuance of a preliminary injunction have been so clearly met

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Cooper, Wharton's State Trials of the United States, pp. 659, 662. With equal logic it could be argued that the President cannot be enjoined from taking action for which he claims authority in Article II of the Constitution. However, it has been contended, and the district court in this case so held, that Secretary Sawyer can be enjoined from carrying out the President's Executive Order. It is by no means clear that department heads can be enjoined from carrying out the President's express orders, by analogy to the fictitious distinction between suits against the United States and suits against an officer personally by which sovereign immunity from suit is minimized (*Larson* v. *Foreign and Domestic Corporation*, 337 U. S. 682), or by analogy to theories of indispensable parties evolved in the solution of venue problems (compare *Williams* v. *Fanning*, 332 U. S. 490, with *Blackmar* v. *Guerre*, 342 U. S. 512). Such theories cannot cope with the problem which would exist if the President personally performed the duties which he here directed Mr. Sawyer to perform. It would seem, therefore, that the issue is sufficiently uncertain and delicate as to constitute a compelling reason for leaving the plaintiffs to their legal remedy for damages.

that "necessity compels it" to "undertake the most important and the most delicate of the Court's functions," *id.*, at 569.

We believe the usual equity requirements have not been met here, in two respects: *First*, the plaintiffs have an adequate remedy at law for any injury which they may suffer; and *second*, even if there were no such remedy at law, the plaintiffs have failed to show any such irreparable injury as would counterbalance the injury to the public from granting an injunction. Although we would be desirous of an immediate decision on the constitutional issues, we feel that deference to the settled practice of this Court in constitutional adjudications requires that we discuss first these non-constitutional grounds of decision, either of which, we think, requires reversal of the judgment below.

A. PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW

Under the fundamental rules governing equitable jurisdiction, plaintiffs are entitled to injunctive relief only if they can show either that legal relief is not available to them or that such legal remedy, although available, would be inadequate. See, *e. g., Coffman* v. *Breeze Corporations*, 323 U. S. 316, 323. We believe that plaintiffs' recourse to injunctive relief is barred because they have an effective remedy in the Court of Claims pursuant

to 28 U. S. C. 1491.[41] It has, of course, been settled in a long line of cases, beginning with *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, that where the United States takes property for public use a right to compensation is enforceable in the Court of Claims, either directly under the Constitution or by virtue of an implied contract. 28 U. S. C. 1491 (1), (4).[42]

Plaintiffs' argument is that this remedy is not available to them unless Secretary Sawyer's acts are supported by statutory or constitutional authority; hence, that the preliminary question whether plaintiffs have an adequate remedy at

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[41] Section 1491 provides:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort."

[42] See, *e. g.*, *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445, 465; *Tempel* v. *United States*, 248 U. S. 121; *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330; *Campbell* v. *United States*, 266 U. S. 368; *Phelps* v. *United States*, 274 U. S. 341; *International Paper Co.* v. *United States*, 282 U. S. 399; *Hurley* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18; *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Dickinson*, 331 U. S. 745; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799.

law hinges on the very merits of the case. We submit, on the contrary, that plaintiffs have a remedy in the Court of Claims, and that therefore the Court need not reach any of the constitutional questions in order to decide that an injunction may not issue.

In such a practical matter as the granting or withholding of an injunction, the formal concession of government counsel, repeated in three courts, that suit may be brought and that no defense of lack of jurisdiction can or will be raised, should be sufficient. See *Pewee Coal Co.* v. *United States,* 115 C. Cls. 626, affirmed, 341 U. S. 114. But even on the theoretical level, plaintiffs need have no fears. For, however one may formulate the rule that unauthorized takings cannot provide the basis for a Tucker Act suit, the qualification has always been recognized that the Court of Claims does have undoubted cognizance of cases, such as this, where a taking of the claimant's property is authorized by statute, although the particular method of taking actually employed by the government official may be claimed to be illegal. In addition, it may now be the law that the Court of Claims has jurisdiction of suits for just compensation for eminent domain takings without regard to whether a taking was legislatively authorized.

1. Even if we accept at face value the doctrine, asserted by plaintiffs, that the Court of Claims remedy depends strictly upon an authorized tak-

ing, it is clear that statutory warrant does exist for a taking by the President and, therefore, that plaintiffs have an indisputable cause of action in that court. Rather than alleging a total absence of any authority in the President to seize the plants, the companies themselves suggest that there are statutes under which the plants could have been seized, but that, since the procedure provided for in those acts has not been followed, they are now entitled to affirmative relief. It is settled, however, that where a taking has been authorized, the use of another method of seizure and the failure to employ the statutory procedure will neither defeat the remedy in the Court of Claims nor justify the issuance of injunctive relief.

The Youngstown and United States Steel complaints both refer to Section 18 of the Selective Service Act of 1948 (62 Stat. 625, 50 U. S. C. App., Supp. IV, 468) (par. 6, R. 2, and par. 12, R. 83, respectively), authorizing the President to place vital defense orders with a manufacturer and to seize his plant if he refuses or fails to fill the order. The United States Steel complaint (par. 12, R. 83) also refers to Section 201 of the Defense Production Act of 1950 as amended (64 Stat. 799, 65 Stat. 132, 50 U. S. C. A. App. 2081), which authorizes the President, whenever he deems it necessary in the interest of national defense, to acquire personal property by requisition and "real property, including facilities, tempo-

rary use thereof, or other interest therein" by way of condemnation. The statute provides that if the property is to be acquired by condemnation the court shall not require the party in possession to surrender possession, unless a declaration of taking has been filed and the amount estimated to be just compensation has been deposited.[48]

The complaints correctly allege that the Government has not complied with the procedural requirements of either statute, but it is undeniable that the President acted for the same public purpose for which the two Acts envisage that private enterprises might have to be taken. Section 201, for instance, authorizes the President to acquire property whenever he deems it necessary in the interest of national defense. Execu-

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[48] This provision is analogous to the one contained in the Declaration of Taking Act (Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a).

As originally enacted, the Defense Production Act of 1950 (P. L. No. 774; 81st Cong., 2d Sess.) assimilated real to personal property and provided that both should be compulsorily acquired by the process of requisition, *i. e.*, by an administrative taking to be followed by a suit for just compensation brought by the claimant. For reasons of convenience and efficiency, and in order to follow the traditional practice in the condemnation of realty, the Department of Justice proposed an amendment providing that real property be condemned in accordance with the Declaration of Taking Act and the general condemnation statutes. This change was adopted in the Defense Production Act Amendments of 1951 (P. L. No. 96, 82d Cong., 1st Sess.). The amendment was plainly not intended to hamper or obstruct the acquisition of interests in real property. See H. Rept. No. 639, 82d Cong., 1st Sess., pp. 23–24, 36.

tive Order 10340 (R. 6–9) contains findings to the effect that a work stoppage would immediately jeopardize and imperil our national defense and that seizure of the steel industry was necessary in order to assure the continued availability of steel and steel products during the present emergency. Hence, conditions existed which would have warranted use of Section 201 (b) if that procedure had not been much too cumbersome, involved, and time-consuming for the crisis which was at hand.

Thus, the President had undoubted statutory power to seize the plaintiffs' properties for temporary use. Congress had itself authorized *a* taking by the President, even if it had not provided for this kind or method of taking.

Once it is shown that the seizing officer had such general authority to take, the Court of Claims' just compensation jurisdiction is undeniable, whether or not the statutory procedures were followed. The most common instance is furnished by the Tucker Act flooding cases. In each, instead of bringing an ordinary condemnation suit under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, a statutory authority similar to Section 201, the government officers proceeded with their rivers and harbors works until the owners' lands were flooded and thereby taken. The owners have repeatedly sued and received just compensation in the Court of Claims for the taking. See the cases cited in fn. 42, *supra*, p. 55.

They have not been defeated by any contention that condemnation proceedings should have been followed. On the contrary, the Court held in *Jacobs* v. *United States*, 290 U. S. 13, 16:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

And the Court only recently reaffirmed the interchangeability of the two proceedings in flooding cases. *United States* v. *Dickinson*, 331 U. S. 745, 747–748. The same interchangeability exists where dry land is taken. See, *e. g.*, *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330, 333; *Stubbs* v. *United States*, 21 F. Supp. 1007 (M. D. N. C.); *Tilden* v. *United States*, 10 F. Supp. 377 (W. D. La.). In all of these numerous instances, a statutory method of condemnation was provided, and in many, the

authorizing statute provided that the land be acquired by condemnation proceedings; but instead of using that mechanism the officials appropriated the property by direct invasion. In each case, a suit for just compensation under the Tucker Act was entertained.

Further examples of Tucker Act jurisdiction on the basis of informal eminent domain are the cases in which a normal condemnation suit has been instituted and possession taken, but the suit has later been abandoned by the Government or held not to include certain tracts. The dispossessed owners have their remedy in the Court of Claims or in the District Court under the Tucker Act. *State Road Department of Florida* v. *United States,* 166 F. 2d 843 (C. A. 5); *Moody* v. *Wickard,* 136 F. 2d 801, 803–804 (C. A. D. C.), certiorari denied, 320 U. S. 775; cf. *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324, 327 (C. A. 9). And this Court has emphatically declared that after a taking has been consummated, the right to recover compensation cannot be defeated because of a technical defect in the authority of the official who took the property. See *International Paper Co.* v. *United States,* 282 U. S. 399, 406, *infra,* p. 71.

Applying these principles and directly controlling is *Hurley* v. *Kincaid,* 285 U. S. 95, in which the Court refused to grant an injunction in circumstances apposite here. Kincaid sought to enjoin Secretary of War Hurley from con-

structing certain flood control work on the Mississippi River which would subject Kincaid's property to flooding, unless the Government first acquired an easement on his property by condemnation. The applicable statutes,[44] analogous to Section 201 (b) of the Defense Production Act, provided that before the United States acquired possession it had to file a condemnation petition in court and deposit an amount of money approved by the court as assuring certain and adequate provision for the payment of just compensation. The Government had complied with none of those provisions. Instead, the officers of the Corps of Engineers were about to undertake construction which, Kincaid claimed, would result in the flooding of his land. He sought to stop the work until the officers complied with the applicable condemnation procedure.[45]

The Court held flatly that Kincaid was not entitled to an injunction. It pointed out (at p. 104) that a taking was authorized by the statutes cited above and that the plaintiff, consequently, had a remedy in the Court of Claims.

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[44] The Mississippi River Flood Control Act of May 15, 1928, sec. 4, 45 Stat. 536, and the River and Harbor Act of 1918, sec. 5, 40 Stat. 911.

[45] Kincaid's brief in this Court urged, as the plaintiffs do here, that the statutory procedure for condemnation was exclusive and had to be followed if a taking was to be effected. See Brief for Respondent, No. 457, Oct. Term, 1931, at pp. 59, 72.

The failure to comply with the statutory direction to condemn prior to the taking did not justify the issuance of injunctive relief. Said the Court (at p. 104):

> The compensation which he may obtain in such a proceeding [under the Tucker Act] will be the same as that which might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking [citing authorities].

In short, the test for the grant of injunctive relief is not whether or not the government has complied with the statutory taking procedure,[46] but whether the plaintiff has a remedy in the

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[46] An analogous rule applies in the field of damages. The owner of property, which has not been condemned, has no remedy in damages against a government contractor provided he has recourse to the Court of Claims. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18.

Court of Claims. Such a remedy is available whenever *a* taking is authorized by legislation.[47]

2. It may also be the case that, aside from the *Hurley* v. *Kincaid* principle we have just discussed, the Court of Claims would have jurisdiction of a just compensation suit by the plaintiffs even though no statute existed authorizing the President to take property. It is true that it has often been said or assumed that an action against the United States for just compensation presupposes that the officers who invaded the plaintiff's property rights had authority to do so. But the reach and application of this rule in Tucker Act suits have not been crystallized and the tendency of the recent cases, particularly in the Court of Claims, is to disregard the issue of authority in favor of assuming jurisdiction wherever there has been an actual physical taking and where the Constitution directs that compensation be paid.

(a). The two basic Tucker Act decisions which ground the asserted rule are themselves unclear. *Hooe* v. *United States*, 218 U. S. 322, involved an *express* limitation upon the officer's authority (see *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 701, fn. 24),[48] a factor which is usually absent and is certainly not present

[47] Cf. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 697, fn. 18.

[48] Cf. *United States* v. *Lynah*, 188 U. S. 445, 465–6:

> That which the officers did is admitted by the answer

here. The precedential value on this point of *United States* v. *North American Co.*, 253 U. S. 330, is lessened by the circumstance that it rested on "special facts" (cf. *Jacobs* v. *United States*, 290 U. S. 13, 18, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497), including the element that North American's claim would have been barred by the statute of limitations if the officer who originally took the property had been authorized to do so.

A number of recent lower court Tucker Act cases seem to make the right to sue for just compensation dependent not upon the taking officer's authority but upon the consideration that where the Government retains the benefit of seized property the owner may seek compensation without showing that the seizure was valid. In *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, 23, certiorari denied, 341 U. S. 948, the Court of Claims stated "that the Government cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain. * * * If Order L–208 resulted in an unauthorized taking, it was a taking of which the

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to have been done by authority of the government, and *although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government.* [Emphasis supplied.]

Government retained the benefit and for which it would therefore be obligated to pay". In *Foster* v. *United States,* 98 F. Supp. 349, 351–2 (C. Cls.), certiorari denied, 342 U. S. 919, the same court strongly intimated that an action for just compensation would lie in every case in which a person's property is kept from him by the United States for its own use. Only the other day, the court declared that in cases where a regulation or statute is unconstitutional as violative of due process, just compensation may still be decreed "if an actual taking [has] been alleged, proved, and loss established * * *." *Idaho Maryland Mines Corp.* v. *United States,* C. Cls. No. 50182, decided May 6, 1952, slip op. p. 10.[*] See also, for cases disregarding or omitting consideration of the taker's authority but nevertheless awarding just compensation, *Forest of Dean Iron Ore Co.* v. *United States,* 106 C. Cls. 250, 265–7; *Niagara Falls Bridge Commission* v. *United States,* 111 C. Cls. 338, 352–3; *Cotton Land Co.* v. *United States,* 109 C. Cls. 810, 830–832; *International Harvester Co.* v. *United States,* 72 C. Cls. 707; *Thayer* v. *United States,* 20 C. Cls. 137.

The lessened stress which appears to be placed on the issue of authority, and the heightened con-

[*] The court also said (slip op., p. 10):

"A regulation which is unconstitutional as violative of due process, because arbitrary, may well result in a taking of the property effected for which just compensation would be due to the extent of the value of the property rights so taken."

cern with providing a Court of Claims remedy for a taking, is also revealed in recent decisions of this Court. *United States* v. *Causby*, 328 U. S. 256, involved the taking of an easement over property adjoining an airfield by frequent flights at low altitude. This Court held the owner of the land entitled to compensation without discussing the authority of the military to make such low flights or to appropriate the easement. This disposition of the case is in marked contrast with the decision in *Portsmouth Co.* v. *United States*, 260 U. S. 327, which involved the analogous situation of artillery fire over private property. There, the Court expressly indicated that the plaintiff could recover only if it established "authority on the part of those who did the acts" (at 330). Again, in *United States* v. *Pewee Coal Co.*, 341 U. S. 114, this issue which, if material, would be of a jurisdictional nature (see *Hooe* v. *United States*, 218 U. S. 322, 336) was not explicitly passed upon by the Court. It is true that in *Pewee* the Government had not defended on the ground that the taking was unauthorized (cf. *Pewee Coal Co.* v. *United States*, 115 C. Cls. 626, 676), but the Government's brief before this Court disclosed that the seizure had not been based on any specific statutory authority,[50] and jurisdictional issues may be noticed on a court's own motion (*United*

[50] See Government's Brief in No. 168, October Term, 1950, pp. 42–44.

States v. *Corrick*, 298 U. S. 435, 440; *United States* v. *Wheelock Bros., Inc.*, 341 U. S. 319).[11]

Another facet of the same concern with providing, rather than denying, a just compensation remedy is shown by *Cities Service Co.* v. *McGrath*, 342 U. S. 330, 335–6 (affirming 189 F. 2d 744, 747 (C. A. 2), and *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479–480 (affirming 156 F. 2d 793, 797 (C. A. 2)), both of which construed the Tucker Act as available to persons from whom property was taken under the Trading with the Enemy Act but whose remedy under that Act was deemed too narrow. See also *Sherr* v. *Anaconda Wire & Cable Co.*, 149 F. 2d 680, 681–2 (if statute cutting off informer's right of action deprived him of "vested right", suit for just compensation was available in the Court of Claims); *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 697, fn. 18 ("Where the action against which specific relief is sought is a taking or holding of the plaintiffs' property, the availability of a suit for compensation against the sovereign [in the Court of Claims] will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment"); *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21–22 (Tucker Act remedy available instead of suit against Government rep-

[11] As we point out below (pp. 140–141), the *Pewee* decision may also be read as holding that a taking like this one is valid and authorized.

resentatives alleged to have taken the plaintiff's property); *Fay* v. *Miller*, 183 F. 2d 986, 989 (C. A. D. C.)

(b). Whatever may be the ultimate general principle distilled from these latter-day developments in the jurisprudence of the Tucker Act, we suggest that in this case the broad doctrine which plaintiffs proclaim should not be applied. Perhaps the most important reason for insisting that an unauthorized taking cannot subject the United States to liability is to prevent executive officials from violating *express* prohibitions imposed by Congress. See *Hooe* v. *United States*, 218 U. S. 322, *supra*, p. 64. A second purpose is, perhaps, to forestall minor officials from seizing property unnecessarily or for personal reasons or through collusion.

Neither of these ends is served by requiring the President's authority in this case to be fully vindicated before suit can be properly maintained under the Tucker Act. Congress has not prohibited the President from doing what he has done here. And it is the President himself, acting in a grave national emergency and for the most public of purposes, who ha seized the plaintiffs' plants, not a minor subordinate acting on his own.

28 U. S. C. 1491 (fn. 41, *supra*, p. 55) may be said to recognize this distinction between executive action founded on a formal order or regulation and independent action taken by subordi-

nates. That section gives the Court of Claims jurisdiction over claims "founded upon any regulation of an executive department" [Sec. 1491 (3)], and it does not add that the regulation must be valid or authorized. Here, the Executive Order would be the basis of the plaintiffs' claim, and since it orders a taking and contemplates just compensation, the Court of Claims would appear to have full jurisdiction under 28 U. S. C. 1491 (3), regardless of the constitutional validity of the President's taking.[32]

3. A further word should also be said as to the practical probabilities of plaintiffs' not having a remedy in the Court of Claims. Government counsel have assured them and the courts that, if an injunction is not issued, no objection will be raised to the Court of Claims' jurisdiction on the ground that the taking was invalid. The *Pewee* case shows that this is not an idle promise, but established Government policy. It is certainly not to the plaintiffs' interest to raise the point of validity in the Court of Claims. Their sole fear is that future Government counsel will make such a defense or that present counsel will change their position. But if that should happen, the

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[32] Conversely, the Tort Claims Act (28 U. S. C. 2680 (a)) exempts from the coverage of that statute a claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *."

courts have a ready answer in the pungent words of Mr. Justice Holmes in *International Paper Co.* v. *United States*, 282 U. S. 399, 406:

> The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

(See also *United States* v. *Georgia Marble Co.*, 106 F. 2d 955, 957 (C. A. 5)). We do not believe that either the Court of Claims or this Court will

have greater difficulty with the future "repudiation of responsibility" which plaintiffs say they fear.

4. The legal remedy which plaintiffs have in the Court of Claims is plainly adequate. There is a short answer to the possible argument that damages in the Court of Claims are an inadequate remedy in view of the uniqueness of the interests taken, the difficulties of assessing damages, and the circumstance that some injuries are incapable of monetary compensation. Plaintiffs' remedy in the Court of Claims is the same as under an award in eminent domain proceedings (*Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Jacobs* v. *United States*, 290 U. S. 13, 16). And it is one of the inherent liabilities of private property that it is always subject to the exercise of the paramount right of eminent domain (*United States* v. *Lynah*, 188 U. S. 445, 465), and that the owner is merely entitled to such monetary compensation as will indemnify him fairly and justly. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 306; *Jacobs* v. *United States*, 290 U. S. 13, 16–17.

Such monetary compensation will clearly be adequate in the present case. The asserted damage which plaintiffs principally allege consists in a trespass or taking, an interference with plaintiff's right to bargain collectively with their employees, and a fear that defendant will impose

some or all of the recommendations of the Wage Stabilization Board.[53] These are usual consequences of the type of taking here involved, for which the remedy of a suit for just compensation has been held adequate. For such a taking to accomplish its purpose necessarily means that the United States "has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining with the operators." *United States* v. *Mine Workers,* 330 U. S. 258, 287. Thus, in *United States* v. *Pewee Coal Co.,* 341 U. S. 114, 118, this Court sustained an award of monetary damages in respect of a wage increase ordered by the Government during the seizure.[54] See also

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[53] Other allegations include asserted interference with the right of management, disruption of customer relations, disclosure of trade secrets, damage to plant and facilities by defendant's agents. See Armco complaint, par. 17, R. 148–152; Jones & Laughlin complaint, par. 16, R. 138–139; Youngstown complaint, par. 14, R. 3; Bethlehem complaint, par. 14, R. 120–121; Republic complaint, par. 12, R. 157–158; U. S. Steel complaint, par. 15, R. 84–86; E. J. Lavino complaint, par. 38, R. 176–177. These are wholly speculative, if not imaginary. Paragraphs 4 and 5 of Executive Order 10341, Secretary Sawyer's Order No. 1 and his telegraphic notice of taking (R. 8, 21, 22) make it plain that the seizure involves no interference with management, the ordinary course of business, or the financial functioning of the seized plants.

[54] That any damages which plaintiffs might suffer as a result of changes in wages or working conditions are measurable and compensable in monetary terms is shown by the Stephens affidavit (R. 99–111), which places a monetary value on each of the recommendations. Pars. 12–18, R. 106–108.

Plaintiffs may assert that the "union shop" is in a different

Wheelock Bros., Inc. v. *United States*, 115 C. Cls. 733, 88 F. Supp. 278.

We think it very doubtful that any real injury will occur to plaintiffs. Cf. *Marion & Rye Valley Railway* v. *United States*, 270 U. S. 280. See *infra*, pp. 75–85. But if any should occur, it would clearly be of the type which can be compensated by suit at law under 28 U. S. C. 1491. *United States* v. *Pewee Coal Co., supra*.[55]

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category. It is difficult to see how the question of the union shop, vital as it is to employees, is of legally recognizable concern to the plaintiffs. Thus the Jones & Laughlin complaint states that the company "cannot, with proper regard for its own convictions concerning principles of Government, agree to the recommendation of a 'union shop'" (R. 136). This hardly states a recognizable interest, cognizable either at law or in equity. The companies have no vicarious standing here on behalf of their employees. And the companies are not eleemosynary corporations or educational foundations with a legally recognizable right to support general principles of government or tenets of political philosophy. In any event, the fact that in a statutory seizure the same result could occur, and would, if it occurred, be compensable only in monetary terms, affords a complete answer to their contention.

[55] The district court's bare statement that "The records show that monetary recovery would be inadequate" (R. 75), unsupported by reasoning or reference to any evidence, does not stand in the way of this conclusion. In any event, since the case was heard on pleadings and affidavits, this Court is in as good a position as the district court to determine the adequacy of monetary recovery.

B. PLAINTIFFS HAVE MADE NO SHOWING OF INJURY SUFFICIENT TO COUNTERBALANCE THE INJURY TO THE PUBLIC INTEREST WHICH WOULD FLOW FROM THE GRANTING OF AN INJUNCTION

Apart from the availability of an adequate remedy at law, plaintiffs have failed to establish a threat of such irreparable injury to themselves as could outweigh the evident irreparable injury to the public interest which would flow from the granting of an injunction. Plaintiffs' obligation in this respect is twofold. They must first make a clear showing of irreparable injury and, second, any such injury must be balanced against the injury to the public. These requirements are applicable to the grant of preliminary and permanent injunctions alike. Notwithstanding the fact that the present case comes up on review of a preliminary injunction, we believe that, on the face of their complaints and affidavits, plaintiffs' showing is so deficient that this Court would be warranted in ordering their actions dismissed forthwith. Alternatively, if this Court deems further proceedings in the district court necessary, we submit that no preliminary injunction should issue.

1. *Plaintiffs have made no showing of irreparable injury.*—The burden on plaintiffs is a heavy one. As this Court said, in a case denying injunctive relief against a taking for which a remedy of just compensation was available:

> Even where the remedy at law is less clear and adequate, where large public in-

> terests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury. [*Hurley* v. *Kincaid*, 285 U. S. 95, 104n.]

Plaintiffs have made no such clear showing. Their general allegations as to interference with their power of management, etc., by the seizure are, on the facts alleged and on every reasonable probability, speculative in the extreme. See n. 53, p. 73, *supra*. And compare *Marion & Rye Valley Ry.* v. *United States*, 270 U. S. 280, 282, holding in respect of a similar seizure that "nothing of value was taken from the company".[56] The gravamen of their complaints is that the defendant threatens to impose new wages and conditions of employment. But the assertion that such threatened action exposes them to irreparable injury disregards several highly pertinent considerations.

a. Plaintiffs ignore the fact that the *status quo* which existed at the time the President acted was that the union had called a strike and workers had started to leave the plants. The President's action thus conferred a great benefit on plaintiffs, by averting a strike which would have caused

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[56] See also *Pewee Coal Co.* v. *United States*, 115 C. Cls. 626, 671, 678, 88 F. Supp. 426, 427, 430–431.

them enormous damages. Plaintiffs' position apparently is that they may ignore the benefit conferred upon them by the President's action while obtaining relief in respect of any damages assertedly flowing from that action. A comparable position was rejected in *United States* v. *Sponenbarger*, 308 U. S. 256.[57] Undoubtedly, the plaintiffs would like to have it both ways. They would like to have the benefits of a guaranty against strikes without having to pay any price, in terms of increased wages and changes in working conditions, for the achievement of those benefits.[58] But we do not see how, in good conscience, they can do so.

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[57] "The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." [308 U. S. at 266–267.]

As indicated below (pp. 81 ff.), we do not believe that the proposed imposition of different wages and working conditions would result in recognizable legal injury. Even if it could be said, however, that that injury was recognizable and substantial, the principle of the *Sponenbarger* case would seem to require that any such injury must be measured against the benefit conferred by the governmental action.

[58] This is clearly reflected in the "oral amendment" to United States Steel Corporation's prayer for an injunction, by which it suggested that the seizure be left undisturbed but that the defendant be enjoined from making any change in wages or working conditions. (R. 76, 311, 313.) Such an order would, of course, have left the plaintiffs in an enviable situation under which they would have continued to operate their mills with a minimum of interference from the United States, with an assurance of no strike for the

The plaintiffs' allegations here are of the same sort which were made in *United States* v. *Pewee Coal Co.*, 341 U. S. 114. There, the dissenting judge in the Court of Claims, whose opinion was adopted in this respect by four judges of this Court, concluded, as to a precisely comparable seizure by executive authority followed by an imposition of changed working conditions which allegedly resulted in an increased cost to the company, that:

> The court has not found that the plaintiff [company] could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts. [88 F. Supp. at 431, quoted in 341 U. S. at 122]

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indefinite future, and with no pressure whatever on them to grant any concessions in an attempt to resolve the underlying labor dispute. We suggest that it is not unfair to assume that this is the relief which all of the plaintiffs really desired, and that the other plaintiffs refrained from joining in the oral amendment made by the United States Steel only because they recognized the impossibility of contending in equity for such a one-sided result.

Mr. Justice Reed, as we read his opinion, failed to go along with this conclusion only because he felt that the finding of the majority of the Court of Claims "that a certain sum was expended without legal or business necessity so to do," 341 U. S. at 121, could not be attacked, the Government having failed to bring up the entire record. And the other four judges in that case rested their approval of the award of damages in large part on the finding that the plant had operated at a loss during the period of Government possession; whereas here, for reasons which we shall develop, there is no reasonable possibility of operation at a loss.

b. Plaintiffs' asserted injuries from the granting of a wage-increase and other changes in conditions of employment are grossly overstated. They ignore, for example, the fact that some increase in wages and change in working conditions was almost inevitable. This was the first occasion since 1947 for thorough review and revision of the collective bargaining agreement. (p. 7, n. 3, *supra*). Moreover, the fact that the Wage Stabilization Board had recommended substantial changes, which it described as in the nature of a "catch-up", designed to equate the position of steel workers with workers in comparable industries, made it practically certain that the union would never enter into an agreement calling for no change. Indeed, the steel companies had indicated their willingness to agree to a "pack-

age" deal of more than 20¢ per hour, an offer which included all of the Board's recommendations intended to be presently effective. (Testimony of John A. Stephens before Senate Committee on Labor and Public Welfare, April 22, 1952, stenographic transcript, volume 3, p. 274; R. 361).[59]

c. Finally, plaintiffs ignore the effect of any price increase which might be allowed. That such

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[59] Stephens, a vice-president of U. S. Steel, signed the principal affidavit submitted by U. S. Steel in support of its application for a preliminary injunction (R. 99). Stephens' affidavit, the most detailed and specific submitted by any of the plaintiffs, substantially overstated their damages in several other respects. Thus, it assumes that Mr. Sawyer would order adoption of the Wage Stabilization Board's recommendations in full, although there is no present indication of any such proposal, and it argues (pars. 19–20) that the company's total costs would increase by twice the amount of any rise in employment costs, despite the absence of any showing—other than a process of reasoning *post* (or even *prior*) *hoc ergo propter hoc*—that there is any causal relationship between an increase in the wages a steel company pays and the cost of other things it must buy (see Statement of Ellis Arnall, Director of Price Stabilization, before Senate Committee on Labor and Public Welfare, April 16, 1952, Sen. Doc. No. 118, 82d Cong., 2d Sess., p. 6).

As for the asserted damage alleged to follow from possible imposition of the union shop, see fn. 54, *supra*, p. 73. In this connection, the actual position taken by the Board on the union security issue should be noted. The Board recommended that the parties determine which of a variety of forms would be adopted. Under a system such as the Rand formula, union security would simply eliminate the "free ride" now enjoyed by nonunion employees. Report and Recommendations of the Wage Stabilization Board, March 20, 1952, pp. 16 ff.

a price increase would compensate, in part or in whole, for any wage increase was clearly recognized in the complaints of United States Steel Co. (par. 15 (c), R. 85) and Armco Steel Co. (Par. 17 (c), R. 149). Both of these complaints, after referring to the threatened wage increases, allege, in identical language:

> These products are subject to price regulations imposed by the United States and the governmental agency regulating such prices has failed and refuses to permit increases in the prices of such products so as to enable plaintiff to attempt to recoup such increased costs.

Indeed, the steel companies have made it clear that they might not object to the proposed wage increases, if price increases, deemed by them adequate to compensate for the wage increases, were also granted. (Panel Report in Steel Wage Case, March 13, 1952, p. 2; Statement on Steel by Ellis Arnall; Senate Committee on Labor and Public Welfare, S. Doc. 118, 82d Cong., 2d Sess., *passim*.)

We do not mean to suggest that substantial price increases will or should be granted.[80] But the fact that plaintiffs have thus tied together the issues of wage increases and price increases indicates, we believe, that their real complaint is with the denial of a price increase.

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[80] An increase under the Capehart amendment (estimated at $3 per ton) has been definitely offered. Statement of Ellis Arnall, *supra*, p. 2. Such an increase would, of course, materially diminish any damages suffered through an increase in labor costs.

What plaintiffs are claiming, accordingly, is a right to profits greater than those permitted by the present price stabilization program. Section 402 (b) (2) of the Defense Production Act requires that price ceilings be "generally fair and equitable." To carry out this direction, the Office of Price Stabilization, with the approval of the Economic Stabilization Administrator, has adopted the "Industry Earnings Standard."[61] That standard requires OPS to raise prices for industry if and when its return on investment, before taxes, falls below 85 per cent of the level enjoyed in the best three of the four years 1946 through 1949.[62] In the event that, as a result of any wage increase that might be directed, profits for the industry should fall below this figure, the plaintiffs would have ample opportunity to apply to the Office of Price Stabilization for an appropriate price increase. The decision of the Office of Price Stabilization would be entered in accordance with the requirements of due process, and

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[61] Statement of Ellis Arnall, *supra*, p. 80. See Press Release, OPS, dated February 19, 1952, "Re: Application of OPS Industry Earnings Standard", particularly Price Operations Memorandum No. 25, Subject: "Industry Earnings Standard".

[62] The steel industry cannot complain of the use of this level; the years 1947–1949 were the most profitable which the steel industry has experienced since World War I. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, April 16, 1952, Senate Document 118, 82d Cong., 2d Sess., p. 3.

would be subject to appropriate judicial review.[63]

On its face, therefore, plaintiffs' contention that they will be subjected to increased costs which cannot otherwise be compensated comes to a contention that plaintiffs have a constitutionally protected and judicially recognizable right to profits greater than those permitted under the Defense Production Act. This contention cannot be sustained. The constitutional validity of a system of price control during a time of emergency is no longer subject to doubt. *Yakus* v. *United States*, 321 U. S. 414. Nor do we think it can be questioned that the basing of ceiling prices on a standard related to past profits is permissible. See, e. g., *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. 2d 361 (E. C. A.); *315 West 97th Street Realty Co., Inc.* v. *Bowles*, 156 F. 2d 982, 985 (E. C. A.), certiorari denied, 329 U. S. 801; *Curtiss Candy Co.* v. *Clark*, 165 F. 2d 791, 795 (E. C. A.), certiorari denied, 334 U. S. 820. See

[63] Steel prices are now being maintained under a voluntary agreement, entered into under Section 402 (a) and 708 of the Defense Production Act, and no maximum price regulation covering steel has been issued. However, the companies are free at any time to withdraw from that voluntary agreement and to set their own prices, thus impelling OPS to issue a price regulation. Accordingly, if OPS refused a request by the companies for a price increase, they would be able to obtain administrative and judicial review (in the Emergency Court of Appeals) by withdrawing from the voluntary agreement and protesting and appealing the price regulation or order which would undoubtedly follow. See fn. 64, *infra*, p. 84.

also Cavers, et al., *Problems in Price Control: Pricing Standards,* Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 7) (1947), c. 2, "Industry Earnings Standard," pp. 27–89; Nathanson, *Problems in Price Control: Legal Phases,* Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 11) (1947), pp. 5 ff.[64] Since this is so, we do not perceive how an imposition of additional labor costs whose effect, if any, on plaintiffs' profits is merely to reduce them to the maximum permissible level, can be said to work the kind of irreparable injury which would warrant a court of equity in interposing its hand to enjoin action taken by the President to meet a grave national emergency.

We do not mean to suggest that this Court need pass on the present controversy between the plaintiffs and the Office of Price Stabilization. But the fact that plaintiffs would have been willing to agree to wage increases such as those which they now complain are threatened to be

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[64] In any event, plaintiffs have an adequate procedure by which any attack on that method of fixing prices could be made. Sections 407 and 408 of the Defense Production Act; *Yakus* v. *United States*, 321 U. S. 414. See fn. 63, *supra*, p. 83.

imposed on them, provided only a substantial price increase were allowed, certainly sheds light on their claim that imposition of those terms would result in enormous and irreparable injury. Just as, in the event of a taking, compensation for any amount in excess of the established lawful ceiling price cannot be allowed save in exceptional circumstances, *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, so we think that in the present situation a threatened loss of profits, which leaves those profits at or above the level at which plaintiffs' ceiling prices are certainly "generally fair and equitable to sellers and buyers of such material or service and to sellers and buyers of related or competitive materials and services," (Defense Production Act, Sec. 402 (b) (2)), can hardly be said to result in such irreparable injury as would justify the issuance of an injunction nullifying the President's act. Cf. *Lichter* v. *United States*, 334 U. S. 742. And to the extent that plaintiffs' ceiling prices may, as a result of increased costs, become less than "generally fair and equitable", they have an adequate remedy by application to the Office of Price Stabilization for a price increase. See *supra*, pp. 82–84.

2. *Any injury to plaintiffs is more than counterbalanced by the injury to the public from the granting of an injunction.*—Assuming, however, that plaintiffs' showing, by itself, is sufficient to establish irreparable injury to them, that show-

ing must be balanced against the showing of injury to the public from the granting of an injunction. The rule is well settled that "an injunction is not a remedy which issues as of course," *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 337–338. Particularly where great public interests are involved, it is established that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552.

In accordance with these principles, we think it clear that the district judge erred in granting a preliminary injunction here. As this Court has said in *Yakus* v. *United States*, 321 U. S. 414, 440, the award of an interlocutory injunction even in private cases "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." See opinion of the Court of Appeals below, 448–449. See also *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. 2d 885 (C. A. 6), certiorari denied, 301 U. S. 710; *Eighth Regional War Labor Board* v. *Humble Oil Co.*, 145 F. 2d 462, 464–465 (C. A. 5), certiorari denied, 325 U. S. 883; *Communist Party of United States* v. *McGrath*, 96 F. Supp. 47 (D. D. C.).

The injury to the public interest from any return to the *status quo* which existed on the night

of April 8, 1952, would be enormous and irreparable, affecting our national safety, our discharge of international commitments, and the lives of our soldiers. See pp. 9–15, 28–49, *supra*. Unlike the allegations of petitioners' affidavits, many of which we are prepared to controvert, the showing of damage to the public interest from any stoppage of production is not, and cannot be, controverted.[65] The district judge erroneously rejected that showing. He doubted whether he should balance the equities at all (R. 74). Moreover, in attempting to do so, he assumed, contrary

[65] In this connection, we wish to point out that many of plaintiffs' affidavits were not served on counsel for defendant until the hearing on preliminary injunction. Thus, the Stephens affidavit and others submitted by the U. S. Steel Company were filed April 24, 1952 (R. 96, 99), the day of the hearing on preliminary injunction. Excerpts were read at the hearing (294–299) but defendant's counsel did not receive copies until the lunch recess.

On the other hand, defendant's affidavits were actually served in two of the cases, Republic, No. 1539, and Youngstown, No. 1550, on April 15 and in fact, counsel for all the plaintiffs also obtained copies at or about that time, although in some of the other cases they were not formally served until shortly before the hearing.

In the event this case should be remanded for final hearing, we, of course, reserve the right to put plaintiffs to their proof, and to offer contrary proof, on all issues relating to the injury assertedly anticipated by them. We, accordingly, would not agree that "nothing that could be submitted at * * * trial on the facts" (R. 74) could alter this case. We feel that the complaints can properly be dismissed now on any of the grounds here urged. But if this Court is not willing to order them dismissed, then the preliminary injunction should be vacated and the case remanded for trial.

to fact, that the *status quo* which he sought to preserve did not include any likelihood of a strike. (R. 74, 75). In fact, not only was a strike imminent on April 8, but one began on April 30, 1952, fifteen minutes after Judge Pine's order. Whether that strike was justified or not is aside from the point; any realistic appraisal of the situation should have recognized its likelihood.

In essence, moreover, the judge rested his idea of balancing equities on a prejudging of the merits. He felt that the enormous damage from a cessation of production "would be less injurious to the public than the injury that would flow from a timorous judicial recognition that there is some basis" for the defendant's contentions in this case as he misconceived them (R. 75). We submit the proper procedure is the other way; the balancing of equities must be before determination of the merits, and where public action is sought to be enjoined, the normal presumption of constitutionality of the act of a coordinate branch of the Government should lead the courts, in preliminary injunction, to assume at least a substantial likelihood that the public officer will prevail on the merits, and to consider seriously the damage to the public interest that would re-

sult on the assumption that he acted constitutionally.[66]

On these grounds we urge that no preliminary injunction should have been granted. We go further, however, and urge also that it is clear that no final relief can be granted. The principles of balancing the equities and of endeavoring to avoid injury to the public interest apply to final as well as preliminary injunctions, *Harrisonville* v. *Dickey Clay Co., supra; Hurley* v. *Kincaid,* 285 U. S. 95; *New York City* v. *Pine,* 185 U. S. 93, 97; *Virginian Ry.* v. *Federation, supra; Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 360; *Morton Salt Co.* v. *Suppiger Co.* 314 U. S. 488, 492, 494; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 670. "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 500. At the very least, those principles require that any doubts as to the showing of irreparable injury, or as to the availability and adequacy of a remedy at law, be resolved against the plaintiffs in order to avoid

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[66] For the foregoing reasons, the usual rule that granting or denial of a preliminary injunction rests in the trial judge's discretion, *Trice & Adams* v. *Lathrop,* 278 U. S. 509, 514, is inapplicable here, even assuming that it may never be applied in cases where a wrong exercise of that discretion has led the trial judge erroneously to reach and decide great constitutional issues and to interfere with action of the President.

both the certain and enormous public injury which would flow from a granting of an injunction and also the necessity for passing on constitutional issues of grave moment. In our view, plaintiffs' remedy at law is certain and entirely adequate. But, in any event, the principle that "a court of equity acts with caution and only upon a clear showing that its intervention is necessary in order to prevent an irreparable injury," *Hurley* v. *Kincaid, supra,* 104n., which has been applied in cases involving far less threat to the public and presenting no important constitutional issues, clearly requires that plaintiffs be left to that remedy for whatever injury, if any, they may suffer.

It should be strongly emphasized that the basic issue is not whether the plaintiffs will suffer damage. Rather, the point is whether any damages which they may incur from continuance of the seizure will outweigh the injury to the public from the grant of an injunction. At this stage it is entirely conjectural whether in fact any damage to plaintiffs will have resulted from the President's acts. But it is certain that grave and incalculable harm will follow the continuance of a restraint on defendant. At the same time, it appears highly probable, if not absolutely certain, that the plaintiffs have a sufficient judicial remedy under the Tucker Act. But whether they have or not, equity cannot permit a catastrophic injury to the entire public in order to avoid a private injury that may be relatively insignificant.

II

THE TAKING OF PLAINTIFFS' PROPERTIES WAS A VALID EXERCISE OF AUTHORITY CONFERRED ON THE PRESIDENT BY THE CONSTITUTION AND LAWS OF THE UNITED STATES

A. GENERAL NATURE OF THE AREA OF CONSTITUTIONAL POWER INVOLVED

For the reasons and under the principles set forth in the preceding point, this Court need not here reach constitutional issues. If, however, constitutional issues are to be reached, they must be considered and resolved in the light of the well settled rule, another aspect of judicial restraint in the delicate process of constitutional adjudication, that courts will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347 (concurring opinion); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 569; *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. Moreover, neither here, nor in any constitutional case, is the Court faced with the need to solve an abstract problem. On the contrary, "* * * the constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular condi-

tions * * *." *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426; and see Opinion of Attorney General Murphy, 39 Op. A. G. 343, 347–348.

Given these two principles, precise analysis of the nature of the problem presented will serve to eliminate much of the rhetoric which has characterized plaintiffs' approach in these cases. It will also serve to sustain, beyond doubt, the validity of the action taken by the President on the night of April 8. On that night, the President took action, purely temporary in nature and subject to various limitations, to meet a critical emergency. And he so acted in the discharge of his constitutional function as Chief Executive and as Commander-in-Chief, of his unique constitutional responsibility for the conduct of foreign affairs, and of his constitutional power and duty to execute the laws. In short, he brought to solution of the emergency the sum of his powers.

1. Separating these elements, first, it cannot be denied that the Presidential action, with which this Court is concerned is intended to be temporary in nature. Less than a day after the issuance of the Executive Order, the President, in a message to Congress, stated that he had undertaken to provide for "temporary operation of the steel mills by the Government" and that he wanted to see Government operation "ended as soon

as possible." House Document No. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962. See also the President's letter of April 21, 1952, 98 Cong. Rec. 4192. In both of these messages to Congress, moreover, President Truman has expressed a readiness to abide by any program or directive which Congress may enact with regard to the emergency situation presented by the threatened shut-down of the steel mills.

2. That the President's action on the night of April 8 was taken in response to a pressing emergency cannot seriously be questioned. Plaintiffs have not controverted, nor can they, the recitals of the executive order or the supporting affidavits which were introduced on behalf of Secretary Sawyer in the district court. *Supra*, pp. 9–15. From these, and from the detailed statement set forth above, pp. 28–49, it is clear beyond question that the President acted in a situation of national emergency in which a shut-off of steel supplies would have been catastrophic. Thus, putting to one side the fact that no issue has been raised as to the findings upon which the President's action was based and assuming that such findings are subject to judicial review, the President's action was clearly based upon and directed to an emergency. This Court has stated that it will inquire into the correctness of such recitals only to determine "whether in the light of all the facts and

circumstances there was any substantial basis" for the challenged action. *Hirabayashi* v. *United States*, 320 U. S. 81, 95; and compare *United States* v. *Russell*, 13 Wall. 623, in which this Court concluded that a constitutional emergency existed in a case in which the sole evidence was the bare statement of the assistant quartermaster commandeering the ships that "imperative military necessity requires the services of your steamers for a brief period."[1] There is no need, however, for us to labor any such restraints upon judicial inquiry in these cases. It is inconceivable that, as a matter of fact, this Court could do other than to conclude that the President was faced by the gravest sort of national crisis on April 8.

[1] This principle is particularly applicable where, as here, the President's decision rested in large part on information available to him as to military and international considerations. *Cf., C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.

3. The sources of the President's power to act must similarly be considered in the light of the actual situation in which the President acted. Whatever view might be taken, broad or narrow, as to the scope of the President's function under any particular clause of Article II of the Constitution, we think it clear that the complex and completely integrated nature of the situation in which the emergency arose brought into play all of his powers.

Each part of the Constitution, as well as the charter as a whole, must be given living and flexible meaning so that it can be ever adapted to vastly differing occasions in the course and development of our national life. "It is no answer * * * to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a constitution* we are expounding' (*McCulloch* v. *Maryland*, 4 Wheat. 316, 407)—'a constitution

intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland*, 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'" *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. at 442–443.

Thus, even if the validity of the President's action in these cases had to be resolved exclusively in terms of any one of the granting clauses of Article II, as plaintiffs appear to insist, we submit that each clause is sufficiently broadly drawn and wide in purpose to support emergency executive action.

Section 1 of Article II provides that "the executive Power shall be vested in a President of the United States of America." In our view, this clause constitutes a grant of all the executive powers of which the Government is capable. Cf. *Myers* v. *United States*, 272 U. S. 52; *Works of Alexander Hamilton* (Lodge Ed.), Vol. 4, p. 438; Theodore Roosevelt, *Autobiography*, pp. 388–389. Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive

(*The Federalist*, Nos. 70 and 71; see also Thach, *The Creation of the Presidency, 1775–1789* (Johns Hopkins University Studies, 1922), Chapters IV, V), it seems plain that Clause 1 of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies. Here, as in connection with each aspect of the President's constitutional powers, a specific and compelling frame of record is provided by the nature of the grave crisis with which the country was faced in the event of a production stoppage in the steel industry.

Again, Section 2 of Article II provides that "the President shall be Commander-in-Chief of the Army and Navy of the United States * * *." Powers stemming from the President's position as Commander-in-Chief, specifically invoked in Executive Order 10340 (R. 6), are also clearly available as the basis for the challenged action in these cases. Cf. *The Prize Cases*, 2 Bl. 635. The place of steel at the very heart of our defense and combat activities, and those of our allies, is forcefully demonstrated by the material deseribed above, pp. 39–49. Included in any consideration of the relationship between steel production and the President's position as Commander-in-Chief must be a genuine recognition of his affirmative power in connection with the safety and effectiveness of American troops in Korea. *Hirota* v.

MacArthur, 338 U. S. 197, 207–208 (Mr. Justice Douglas, concurring). From this basis alone, we submit, would stem ample power to "supply an army in a distant field * * *," *United States* v. *Russell,* 13 Wall. 623, 627, to take whatever steps were necessary to insure that no condition of danger be created by reason of a failure of supply of steel. Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers.

In addition to the general grant of executive power in Section 1 and the powers thus clearly stemming from the Commander-in-Chief clause, the President is under the duty imposed on him by Section 3 of Article II to "take Care that the Laws be faithfully executed." The broad scope of Section 3 has been delineated by this Court (*In re Neagle,* 135 U. S. 1, and, again, in *In re Debs,* 158 U. S. 564; see also Statement by Attorney General Jackson, June 10, 1941, 89 Cong. Rec. 3992) and is also available to justify the action taken by the President in these cases as a necessarily implied part of his express obligation to carry out our national policy to deter and repel aggression. See *supra,* pp. 28–39; *infra,* pp. 144–150.

But the validity of the President's action on April 8 is not to be determined, either as a matter of common sense construction or as a matter of historic judicial method, by reference to one specific clause. On the contrary, from the beginning of the Republic, it has been recognized that Presidential power to act on a particular occasion may derive from more than one of the grants contained in Article II. For example, the legislative decision of 1789 as to the removal power of the President was bottomed upon both the vesting of the executive power in the President and upon his power and duty to take care that the laws shall be faithfully executed. See Substitute Brief for the United States on Reargument in *Myers* v. *United States,* No. 2, October Term, 1926, pp. 49–91. And this Court's decision on this question in *Myers* v. *United States*, 272 U. S. 52, was likewise based not upon a single provision of Article II but upon the combined force of the several provisions. Similarly, the doctrine, announced as early as 1800 by Chief Justice Marshall as a Member of the House of Representatives, that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" (Annals of Cong., 6th Cong., col. 613) does not rest upon any single provision of Article II but upon a combination of provisions. Cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304; *United States* v. *Pink,* 315 U. S. 203. Again, the

authority and ability of the President to execute the laws depends not only on the provision that "he shall take Care that the Laws be faithfully executed," but also upon his authority as Chief Executive, as Commander-in-Chief, and as the organ of foreign relations. Cf. *In re Neagle*, 135 U. S. 1; *In re Debs*, 158 U. S. 564.

It is thus plain that, in the light of the circumstances which confronted the President on April 8, there could be no justification for a requirement that his action be seen as confined to any one of the provisions set forth in Article II. On the contrary, this power to act must be taken as having sprung from all the available clauses.[2] Cf.

[2] History records numerous well-known incidents in which executive powers taken as a whole have been broadly exercised, and we think it unnecessary to rehearse them here extensively. A few notable examples, which readily come to mind, may be mentioned. Perhaps the earliest instance of broad executive action is President Washington's Neutrality Proclamation of 1793, which was at first criticized as an usurpation of authority but "has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration." *Myers* v. *United States*, 272 U. S. at 137. Authority for its issuance has been laid in the provision vesting the executive power in the President and in the provision empowering him to execute the laws. Cf. 7 Hamilton, *Works of Alexander Hamilton* (1851) pp. 80–81; 2 Story, *Commentaries on the Constitution* (1891) Sec. 1570. Similarly, such incidents as the suppression of the Pennsylvania Whiskey Rebellion by President Washington, President Jackson's Proclamation of 1832 that he would employ force to prevent the execution of the South Carolina Ordinance of Nullification, and President Cleveland's dispatch of troops to Illinois in 1894 in connection with the Pullman

Woods v. *Miller Co.*, 333 U. S. 138, 144. Rigid concepts, comparable to notions of common law pleading, which would require either the President or the Congress to specify particular powers as the basis for necessary and valid action, at their peril, should be taken as of no more value in resolving the living problems present in these cases than is the discredited technique of constitutional interpretation, based on "immutable" principles, which was employed by the court below.

4. We have sought to show affirmatively the precise nature of the area of constitutional powers involved in these cases. We think it plain that the action to be tested must be seen as temporary in nature and taken in an emergency situation and must be measured against a variety of

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Company strike were constitutionally authorized by virtue of the President's power to execute the laws, his power as Commander-in-Chief, and the vesting in him of executive power. Cf. *In re Debs*, 158 U. S. 564. Again, based on these sources of authority and upon the President's power in the field of foreign relations, President Tyler, without statutory authority, sent naval vessels and soldiers to Texas in 1844 to protect Texas against Mexican aggression pending Senate ratification of the Treaty of Annexation which he had negotiated. Indeed, in reliance upon this aggregate of Presidential powers, there have been more than 100 occasions in which the Presidents, without Congressional authorization and in the absence of a declaration of war, have ordered our armed forces to take action or maintain positions abroad to protect the lives and property of the United States citizens, to protect the honor of the United States, to open areas to the foreign commerce of the United States and to defend the United States. See H. Rept. 127, 82d Cong., 1st Sess., pp. 55–62.

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constitutional powers granted to the President by Article II. The narrow constitutional question actually presented, then, is one of means, whether seizure is a method available to the President, in the exercise of his constitutional powers, to avert a crisis of this type.

B. THE PRESIDENT, WITHOUT SPECIFIC STATUTORY AUTHORITY, MAY SEIZE PROPERTY TO AVERT CRISES DURING TIME OF WAR OR NATIONAL EMERGENCY, SUBJECT TO THE PAYMENT OF JUST COMPENSATION

Turning then to the precise question presented here, it should first be noted that, where the President possesses constitutional powers to meet emergencies, he necessarily has "wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it." *Hirabayashi* v. *United States*, 320 U. S. 81, 93. Second, it cannot be overemphasized that, considered as federal governmental action, there can be no doubt of the validity of what was done. That is to say, if precisely such a seizure made in precisely this manner and followed by precisely the same actions or proposed actions in respect of the management of the seized plants had been taken under explicit Congressional authorization, there could, we submit, be no conceivable question of its validity. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258; *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S.

456, 462; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C. A. 7), vacated as moot, 326 U. S. 690; *Ken-Rad Tube & Lamp Corp.* v. *Badeau*, 55 F. Supp. 193 (W. D. Ky.); *Alpirn* v. *Huffman*, 49 F. Supp. 337 (D. Neb.).[8]

The real question here, therefore, is whether seizure was a means available to the President, in the exercise of his constitutional powers, to meet the pressing emergency which faced the nation. On this issue, ample support is to be found in executive and legislative precedent for the President's action. Moreover, there is direct judicial recognition of executive seizure as a means of meeting emergency situations.

1. *Executive construction.*—During the Revolution and the War of 1812 there were numerous

[8] It should perhaps be emphasized that the President's action in no way violates any of the prohibitions on governmental action contained in the first ten Amendments. There is no question here, for example, of any infringement by the President of the rights of freedom of speech, religion, or press guaranteed by the First Amendment, or of the right to be secure from search and seizure guaranteed by the Fourth Amendment or of the rights of jury trial, privilege against self-incrimination, assistance of counsel, etc., guaranteed by the Fifth and Sixth Amendments. The President's action is entirely consistent with the rights of property guaranteed by the Fifth Amendment. That amendment expressly recognizes that private property may be taken for public use upon payment of just compensation, and we concede that just compensation will here be payable in respect of any injury which the plaintiffs may prove to have resulted from the taking. See Point I A, *supra*. The invasion of property rights is only to the extent and for the period of time necessary to meet the emergency.

instances of taking of property for the benefit of the armed services by military officers. While the exact nature of these takings is seldom clear from the available records, most of them appear to have been based entirely on executive authority. The records show that during the Revolution, the buildings of Rhode Island College, as well as other buildings throughout the country, were taken over for use as hospitals and barracks. Other instances were the taking of wagons, horses, and slaves required for public service. During the War of 1812 the property of traders at Chicago was taken to prevent its falling to the enemy, rope walks at Baltimore were destroyed for the same purpose, a house was taken to hold military stores and was later blown up to prevent those stores falling to the enemy, and, in Louisiana, General Jackson freely took plantations, fencing, and supplies as the emergency dictated.[4] By the

[4] American State Papers, Class IX, Claims No. 86, p. 197; No. 584, p. 833; No. 590, p. 838; No. 243, p. 424; No. 258, p. 441; No. 266, p. 446; No. 345, p. 521; No. 356, p. 525; No. 461, p. 649.

In case No. 461, p. 649, General Swartwout, under order of General Wilkinson, took certain vessels to be used in operations on the St. Lawrence in 1813. The general was sued in a New York state court and judgment was given against him for $2500.00. The Committee on Military Affairs recommended that this sum be repaid to General Swartwout, saying "In the circumstances of war, such exigencies will frequently occur, in which the commanding officer will stand justified in taking, by force, such necessaries, either for support or conveyance, as are absolutely indispensable and which cannot be obtained by any other means."

close of the War of 1812, it was firmly established that property could be taken in wartime emergencies as an exercise of independent executive power.

More pertinent parallels in history are found during the administrations of Presidents Lincoln, Wilson, and Franklin D. Roosevelt.

The first discovered instance of a taking by order of the President himself, as distinguished from a taking by a subordinate military official, occurred in the first year of the Civil War.[5] On April 27, 1861, Secretary of War Cameron, at the direction of the President, issued a declaration taking over the railroads and telegraph lines between Washington and Annapolis.[6]

Confronted with secession, President Lincoln exercised greater executive power than had been exercised by any previous President. His most dramatic act of executive taking was his Emancipation Proclamation of January 1, 1863, an action resting exclusively on his constitutional powers as

[5] The power of seizure of private property had apparently also been exercised during the War with Mexico by military officers. One such seizure resulted in the celebrated case of *Mitchell* v. *Harmony*, 13 How. 115, which is discussed in detail *infra*, pp. 126–131.

[6] War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, v. II, p. 603. Secretary Cameron's correspondence shows that he acted with full Presidential authority. *Ibid.*, 604. For details of the control, see *ibid.*, pp. 605, 609, 610, 611, 623.

Commander-in-Chief.' Although the Proclamation was operative only in the Confederate areas, it is indicative of Lincoln's basic conception of the power of the Chief Executive in time of war. He said in a comment on the constitutionality of the Proclamation:

> I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said—if so much—is that slaves are property. Is there—has there ever been any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it will help us, or hurt the enemy?[8]

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[7] Less pertinent here, but equally broad and vigorous, were the actions taken by Lincoln when, without statutory authority, he increased the size of the Army and the Navy, ordered the payment from the Treasury of monies to those not authorized to receive it, and suspended the writ of *habeas corpus*. Corwin, *The President, Office and Powers* (1948 ed.), pp. 277–278. In addition, he proclaimed a blockade of the Southern ports and ordered the taking of blockade-runners, an order which, although without congressional authorization, was upheld in the *Prize Cases*, 2 Bl. 635.

[8] Letter to James C. Conkling, Aug. 26, 1863, IX Nicolay and Hay, Works of Abraham Lincoln, 95 at 98. The effect of the Emancipation Proclamation was considered in a number of cases, but none has been discovered which relate to the immediate problem *The Emancipation Cases*, 31 Tex. 504 (1868); *Slaback* v. *Cushman*, 12 Fla. 472 (1869); *Dorris* v. *Grace*, 24 Ark. 326 (1866); *Morgan* v. *Nelson*, 43 Ala. 586 (1869).

Following the precedent set by President Lincoln, Wilson, too, exercised his constitutional powers to seize the property of the Smith & Wesson Company on August 31, 1918. See Testimony of Attorney General Biddle, Hearings, House Select Committee To Investigate Montgomery Ward Seizure, 78th Cong., 2d Sess., pursuant to H. Res. 521, June 8, 1944, pp. 167–168. In describing that action in a letter to striking workmen of the Remington Arms Company in Bridgeport, Connecticut, Wilson stated (Baker, *Woodrow Wilson, Life & Letters, Armistice* (1939), Vol. 8, pp. 401–402):

> The Smith & Wesson Company, of Springfield, Mass., engaged in government work, has refused to accept the mediation of the National War Labor Board and has flaunted its rules of decision approved by Presidential Proclamation. With my consent the War Department has taken over the plant and business of the Company to secure continuity in production and to prevent industrial disturbance.
>
> It is of the highest importance to secure compliance with reasonable rules and procedure for the settlement of industrial disputes. Having exercised a drastic remedy with recalcitrant employers, it is my duty to use means equally well adapted to the end with lawless and faithless employees.

In addition to his actual seizure of Smith & Wesson and his threat of a similar measure as a

sanction against the employees of the Remington Arms Company (Corwin, *op. cit. supra* (1948), p. 298), Wilson also seriously contemplated the seizure of the Colorado coal mines in 1914 because of a strike there. No seizure was effected, however. *Woodrow Wilson Papers*, File 6, Box 393, Nos. 901, 902, Division of Manuscripts, Library of Congress; Corwin, *op. cit. supra* (1948), p. 453, n. 107.[9]

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[9] Prior to his accession to the Presidency, Wilson had expressed views comparable to Theodore Roosevelt's "stewardship" theory of executive power. Wilson, *Constitutional Government in the United States*, pp. 88–89. During World War I, he adhered to those views, and, acting without statutory authority, created a War Industries Board, a War Labor Board, and a Committee on Public Information. Berdahl, *War Powers of the Executive*, p. 172. On April 28, 1917, he ordered that all telegraph and telephone lines and cables be operated only pursuant to regulations of the Secretary of War or the Secretary of the Navy, although there was no statutory authority for this action. On July 13, 1917, again without statutory authority, Wilson issued a proclamation preventing German marine and war-risk insurance companies from operating in the United States on the ground that the German Government apparently was obtaining information concerning ship movements through these companies. Again in 1917, President Wilson asked Congress to arm merchant vessels and when such authority was not forthcoming he, as an exercise of his constitutional powers, gave notice of determination to arm all American merchant vessels and placed naval personnel and guns thereon. From 1917 to 1922, troops were sent into the States more than 30 times, a majority of these instances being in connection with labor disputes. Corwin, *op. cit. supra* (1948), pp. 287, 166; Berdahl, *op. cit. supra*, pp. 68–70, 200.

The most recent and extensive exercise of the executive power to seize property without statutory authority occurred during the administration of President Franklin D. Roosevelt. On twelve occasions prior to the enactment of the War Labor Disputes Act on June 25, 1943 (57 Stat. 163, 50 U. S. C. App. 150–1511), which authorized the seizure of plants, President Roosevelt issued Executive Orders taking possession of various companies when it appeared that a work stoppage would seriously impede operations.[10] The first seizure occurred as much as six months prior to Pearl Harbor,[11] and a total of

[10] List of plants and facilities taken by President Roosevelt prior to the passage of the War Labor Disputes Act.

Executive Orders	Date	Concerns Involved
Executive Order No. 8773	June 9, 1941	The North American Aviation Pl.
Executive Order No. 8868	August 23, 1941	Federal Shipbuilding & Drydk. Co.
Executive Order No. 8928	October 30, 1941	Air Associates, Inc.
Executive Order No. 8944	November 19, 1941	Grand River Dam Project.
Executive Order No. 9108	March 21, 1942	Toledo, Peoria & Western R. R. Co.
Executive Order No. 9141	April 18, 1942	Brewster Aeronautical Corp.
Executive Order No. 9220	August 13, 1942	General Cable Company.
Executive Order No. 9225	August 19, 1942	S. A. Woods Machine Co.
Executive Order No. 9254	October 12, 1942	Triumph Explosives, Inc.
Executive Order No. 9340	May 1, 1943	Coal Mines.
Executive Order No. 9341	May 13, 1943	American R. R. Co. of Puerto Rico.
Executive Order No. 9351	June 14, 1943	Howarth Pivoted Bearings Co.

[11] This first seizure, of the North American Aviation Plant, was justified by the then Attorney General Jackson as an act within the "duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense efforts of the United States a going concern." 89 Cong. Rec. 3992.

three plants were seized before our entry into the War.[12]

Although other Presidents apparently did not have the occasion to meet crises of the magnitude and complexity here presented, brief mention should be made of the following incidents of a similar nature which illustrate the views of others who have occupied the office. President Hayes, in connection with the railway strike of 1877 and on other occasions, did not hesitate to make drastic use of his constitutional powers, including the use of troops. Corwin, *op. cit. supra,* (1948), p. 164. Again, in 1894 President Cleveland, over the objection of the Governor of Illinois, sent troops to Chicago in connection with the Pullman strike

[12] Less pertinent here but equally significant were other actions taken by President Roosevelt without statutory authority, both during the depression emergency and the war emergency. A notable illustration during the depression was the National Bank Holiday. The emergency caused by the war in Europe required a frequent exercise of his constitutional powers both before and after the attack on the United States. A familiar exercise of these powers, for which Wilson in World War I had set a notable precedent in the War Industries Board and other agencies, was in the creation of executive agencies. Thus, the Office of Price Administration and Civilian Supply and the Office of Emergency Management were created by the President long before our entry into the War. Among the others created before or after the beginning of World War II by executive order were BEW, NWLB, OCD, ODT, OWI, OPM, WMC and NHA. Other types of executive action taken included the occupation of Iceland by our troops, and action taken in connection with labor disputes. Corwin, *op. cit. supra,* (1948), pp. 293, 294, 299, 300, 493, 494.

in order to remove obstructions to interstate commerce and the passage of mails. President Cleveland proclaimed that this action was taken for the purpose of enforcing the faithful execution of the laws of the United States and the protection of its property and removing obstructions to the United States mail. An injunction in connection with the strike was sustained in the *Debs* case, 158 U. S. 564, and the use of troops in that instance was approved by the Court as an exercise of the President's constitutional powers to enforce the Federal laws. 158 U. S. 564, 582. Similarly, President McKinley dispatched troops to Idaho in 1899 to suppress the disturbances resulting from a strike of lead and silver miners. Berman, *Labor Disputes and the President* (1942), Ch. II. In 1902, Theodore Roosevelt seriously considered taking possession of the Pennsylvania coal mines during a strike in the mines to prevent a coal shortage. The taking never became necessary because the dispute was settled. 20 *Works of Theodore Roosevelt,* p. 466; Corwin, *op. cit. supra,* (1948), p. 190.[13] Later in his administra-

[13] An unpublished opinion of Attorney General Knox, dated October 10, 1902, stating that the President had no power to make such a seizure and resting the argument largely on the view that a coal strike in Pennsylvania presented matters of local and not federal concern, may be found in the Manuscript Division of the Library of Congress, among the Theodore Roosevelt papers. For a contrary view as to the power of the President in 1902, see *Dakota Coal Co.* v. *Fraser*, 283 Fed. 415, 417 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8).

tion, he withdrew from private entry "pending legislation" many parcels of land for forest and coal reserves although the pertinent statutes authorized withdrawal only of lands in which mineral deposits had been found. Corwin, *op. cit. supra,* (1948), p. 147. President Taft, despite his expression of views as an academic matter, did not hesitate to take similar action, in the teeth of existing statute, as a matter of executive power, based on usage. *United States* v. *Midwest Oil Co.,* 236 U. S. 459. And President Harding, like his predecessors, employed troops to quell the West Virginia Mine disorders of 1921. Berman, *op. cit. supra,* pp. 210–213.

2. *Legislative construction.*—As noted above, the first discovered instance of a Presidential taking was Lincoln's seizure, through his Secretary of War, of the railroad and telegraph lines between Washington and Annapolis in 1861. In January 1862, legislation was enacted which confirmed the Presidential power to take over any railroad or telegraph line in the United States and provided penalties for interference with their operation by the Government (12 Stat. 334).[14] Throughout the debates on the proposed legislation, virtually every Senator and Representative

[14] On February 11, 1862, President Lincoln, pursuant to that statute, took possession of all railroads in the United States. 6 Richardson, *Messages and Papers of the Presidents,* 101.

who addressed himself to the subject either assumed or declared that the President had the inherent constitutional power to take the railroads and telegraph lines if he thought it necessary in the exercise of his war powers. The supporters of the bill advocated its passage as a declaration of existing law and as a means of providing a rigorous system of penalties.

Thus, the sponsor of the bill in the Senate, Senator Wade, stated, "Mr. President, this bill confers no additional power upon the Government, as I understand it, beyond what they possess now. It attempts to regulate the power which they undoubtedly have; for they may seize upon private property anywhere, and subject it to the public use by virtue of the Constitution." Cong. Globe, 37th Cong., 2d Sess., p. 509. And the sponsor of the bill in the House, Representative Blair, similarly stated that the bill "does not confer on the Secretary of War any new or any dangerous powers. The Government has now all the powers conferred by this bill; and the simple object of the bill is to regulate, limit, and restrain the exercise of those powers." *Ibid.*, p. 548.

Equally enlightening was the opposition of Senators Cowan, Browning, Grimes and Fessenden, who voted against the bill on the ground that it was unnecessary and might be construed as a limitation on existing powers. Viewing the question in that light, Senator Cowan, for example,

observed that "When Congress declares war, and provides an army and navy for the President to achieve a particular thing, it confers upon him at the same time all the powers necessary to attain the desired end; and among other things it confers on him power, as has been well said, to impress horses, railroads, telegraph lines, men, teams, everything of that kind into his service, and compel them to work according to his plan and pattern." *Ibid.* p. 516. For similar statements see *ibid.*, p. 512 (Fessenden), *ibid.*, pp. 510, 520 (Browning), and *ibid.*, p. 520 (Grimes).[15]

The legislative history of the War Labor Disputes Act of June 25, 1943 (57 Stat. 163, 50 U. S. C. App. 1501–1511) is strikingly similar. The Act was passed in the 78th Congress but finds its antecedent in the 77th Congress. On

[15] The nature of the President's powers was also discussed in the Congress in connection with the Act of July 16, 1918, 40 Stat. 904, which authorized the taking of the telephone and telegraph lines during World War I. Relative to that power, President Harding, then Senator Harding, although opposed to the bill, stated

> Mr. President, I listened with a good deal of attention yesterday to the able remarks of the senior Senator from Illinois [Mr. Lewis], and I recall that he said, if there were a real war emergency, if there were a present necessity for the seizure of the lines of communication in this country, the Chief Executive would take them over, else he would be unfaithful to his duties as such Chief Executive. I agree with that statement; and if the President believes that there is such an emergency, he ought to seize them. (56 Cong. Rec. 9064.)

June 5, 1941, Senator Connally introduced S. 1600 (87 Cong. Rec. 4736). This bill was roughly similar to Section 3 of the War Labor Disputes Act as finally enacted, the most notable difference being that the bill covered plants "equipped for the manufacture of any articles or materials" without reference to mining or production. On June 9, 1941, as noted above, p. 109, the President took possession of the North American Aviation plant at Inglewood, California, to end an interruption of production caused by a strike. On June 10, 1941, Senator Connally offered a virtually identical proposal as an amendment to S. 1524, a bill amending the Selective Service Act in certain respects wholly unrelated to the present litigation (87 Cong. Rec. 4932).[16]

As with the Civil War Congress, discussed above, it was again generally recognized in consideration of the bill that the President already

[16] The Connally amendment passed the Senate, but was revised into wholly different form and finally rejected altogether by the House. In conference the Connally proposal was adopted but the House rejected the conference report. S. 1524 eventually passed without any amendment on plant seizures. The House Report on the bill is H. Rept. 785, 78th Congress. The House Conference report is reprinted at 87 Cong. Rec. 6331 and the report was rejected by the House at 87 Cong. Rec. 6424. I November 1941, Senator Connally introduced a new bill, S. 2054. The bill was reported favorably. Meanwhile, war was declared, and Senator Connally abandoned the bill for the remainder of the 77th Congress, in view of the President's creation of the War Labor Board.

had full constitutional power to take the actions contemplated by the Act. Again, some Congressmen voted against the bill on the ground that it was unnecessary but others thought legislative action desirable to remove any possible doubt. Representative May, Chairman of the House Military Affairs Committee, to which the bill was referred, said (87 Cong. Rec. 5895):

> Mr. Chairman, if any Member thinks that is wrong, that it is wrong that the President should have this power to take over an industry for the purpose of policing it just because one or two men may object, that Member will have the opportunity to express himself by his vote; but let me tell you a few things. We hear it said the President already has power to do this. I think he has, and I think he exercised it wisely when he took over the plant in Inglewood, Calif. * * *

Representative Whittington, supporting the bill, said (87 Cong. Rec. 5972):

> We approve the course of the President of the United States in the North American air plant in California. It was never argued; it was never stated by the Attorney General that the President had such authority under section 9 of the Selective Service and Training Act. It is only maintained that he had that authority under the Constitution as Commander in Chief. I say that the bill should be enacted and that

> the President of the United States should be given the power by statute to do that which he did in the case of the aviation company in California.

On the other hand, Representative Dirksen contended that the bill was unnecessary (87 Cong. Rec. 5974):

> Secondly, let me submit to you that the Commander in Chief who can occupy Iceland with the troops of the United States and advise Congress of this action 6 days later does not need any legislation to occupy a plant in the United States of America. He has done it once and he can do it again. Surely no proponent of the pending bill will arise to confess that what the President did before in California was or is illegal.[17]

The Connally proposal, which had first been debated after the President's seizure of the North America plant, was again introduced by the Senator in the 78th Congress after the seizure of the coal mines. As introduced the bill was substantially the same as S. 2054, considered in the previous Congress, and it was speedily reported favorably without Committee hearings.[18] The congressional debate reveals no purpose to impugn the President's constitutional power but,

[17] Similar views as to the President's power were expressed by Rep. Dworshak, 87 Cong. Rec. 5901, Rep. Faddis, *ibid.*, 5901, Rep. Harter, *ibid.*, 5910, and Rep. Hook, *ibid.*, 5975.

[18] S. Rep. 147, 78th Cong., 1st sess.

rather, indicates to the contrary. In the course of discussion, Senator Connally described on several occasions the object and scope of the bill (89 Cong. Rec. 3807):

> There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to authorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

Similarly, Senator Austin said (89 Cong. Rec. 3896):

> The pending proposal is but a part of the whole picture * * * It merely says that we will supplement the powers enumerated, which are powers given by the Constitution to government, powers which

> are inherent with government without being given, anyway, * * *.

General acceptance of the President's constitutional powers was also expressed by Senator Lucas, 89 Cong. Rec. 3885, Senator McClellan, *ibid.*, 3887, and Senator Wheeler, *ibid.*, 3887. Senator Tydings offered an amendment which would have specifically ratified the taking of the coal mines. This amendment was defeated on the pleas of Senators Connally and Barkley that such formal language of ratification might cast doubt on the validity of the President's constitutional power to take, *ibid.*, 3989, 3992, 3993.[19]

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[19] After the enactment of the War Labor Disputes Act, identical views were expressed by Attorney General Biddle in advising President Roosevelt as to the legality of the proposed Executive Order [Executive Order No. 9438, 9 F. R. 4459, April 25, 1944] directing the Secretary of Commerce to take possession of, and to operate, certain plants and facilities of Montgomery Ward. Attorney General Biddle concluded that the Act did authorize the action contemplated by the President but pointed out that (40 Op. A. G. 312, 319–320):

> It is not necessary, however, to rely solely upon the provisions of section 3 of the War Labor Disputes Act. As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." The Constitution also places on the President the responsibility and invests in him the powers of Commander-in-Chief of the Army and Navy. In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor

3. *Judicial precedent.*—Even were there no direct judicial authorities, we believe that these historical precedents would be sufficient support for the President's action here. As Mr. Justice Holmes has cogently observed, "a page of history

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disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort. In modern war the maintenance of a healthy, orderly, and stable civilian economy is essential to successful military effort. The Congress has recognized this fact by enacting such statutes as the Emergency Price Control Act of 1942; the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes"; the Small Business Mobilization Law of June 11, 1942; and the War Labor Disputes Act. Even in the absence of section 3 of the War Labor Disputes Act, therefore, I believe that by the exercise of the aggregate of your powers as Chief Executive and Commander-in-Chief, you could lawfully take possession of and operate the plants and facilities of Montgomery Ward and Company if you found it necessary to do so to prevent injury to the country's war effort.

Earlier, on October 4, 1939, Attorney General Murphy had stated as follows in reply to a request of the Senate for his opinion on the war emergency powers of the President:

> You are aware, of course, that the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically de-

is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349. Contrary to plaintiffs' assertions that these precedents prove a usage but do not establish its validity, "even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 525. "Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472–473; *United States* v. *Macdaniel,* 7 Pet. 1, 13–14.

In any event, direct judicial recognition of the executive power to seize property to avert a crisis in time of war or national emergency is not lack-

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fined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action. [39 Op. A. G., pp. 343, 347–348.]

ing. As this Court said in *United States* v. *Russell*, 13 Wall. 623, 627:

> * * * in cases of extreme necessity in time of war or of immediate and impending public danger, * * * private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent

> of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. * * *.

Indeed, judicial controversy in this area has not been over the question whether the power to take exists but whether just compensation was required in view of the circumstances of the taking. In the analysis which follows we shall show (1) that the pertinent cases all hold that the executive may, without statutory authorization, employ seizure as a means of averting impending crisis; (2) that the power to seize is of two types, one based on the police power and the other in the nature of eminent domain; (3) that the police power seizure, which is not involved in this case, does not require compensation; (4) that the eminent domain taking, which is here involved, requires necessity and the payment of just compensation but can be exercised without regard to its physical relation to the field of battle; and (5) that since the owner suffers no greater injury from a taking under the eminent domain power than any other person whose property is taken by the usual legislative-

judicial eminent domain process, a lesser degree of necessity justifies eminent domain takings as contrasted with police power seizures.

(a). The first reported American case discovered, *Respublica* v. *Sparhawk*, 1 Dall. 357, involved a claim for compensation for property removed from Philadelphia during the Revolution by order of Congress to prevent it from falling into the hands of the enemy. The property later was captured by the enemy in its new location. Compensation for its loss was denied by the Pennsylvania Supreme Court. The taking was compared to those involved in the destruction of buildings to prevent the spread of fire. Although the case did not involve a purely executive taking, the decision played a principal part in the development of the police-power branch of the law.

Two significant developments occurred in the period from the War of 1812 to the Civil War. The first was the emergence in the state courts of a clearer concept of the police power aspect of the executive power, and the second was the earliest Supreme Court decision dealing squarely with the power of the Executive to take property in wartime.

The executive power of taking was dealt with in the state courts in this period in connection with the problem of liability of municipal officers for destruction of buildings to prevent the spread of

fires. The courts reasoned from the war-power precedents like the *Sparhawk* case. Thus, in the leading case of *Mayor of New York* v. *Lord*, 18 Wend. 126 (1837), involving liability of destruction of buildings in face of fire, the court discussed the problems in terms of the recognized privilege to destroy property without liability in case of such necessity as the advance of a hostile army. While the cases are not unanimous as to compensation, they hold generally, reasoning from the maxim *salus populi est suprema lex* and from the analogy of wartime emergency, that property may be destroyed under such circumstances without compensation.[20] In the cases falling in later periods this authority is rested explicitly on the police power.[21] The leading case of the period is *Parham* v. *The Justices*, 9 Ga. 341, 348, 349 (1851), a case involving an eminent domain problem not directly relevant to this discussion, but in which the court enunciated a principle often referred to in later decisions that "in cases of urgent public necessity, which no law has anticipated, which cannot await the action of the

[20] *Meeker* v. *Van Rensselaer*, 15 Wend. 397 (1836); *Russell* v. *Mayor of New York*, 2 Den. 461 (1845); *American Print Works* v. *Lawrence*, 23 N. J. L. 590 (1851); *Surocco* v. *Geary*, 3 Cal. 69 (1853); *McDonald* v. *City of Red Wing*, 13 Minn. 38 (1868).

[21] *Aitken* v. *Village of Wells River*, 70 Vt. 308 (1898); *Bowditch* v. *Boston*, 101 U. S. 16; 2 Cooley, *Constitutional Limitations* (8th ed.) 1313; David, *Municipal Liability in Tort in California*, 6 S. Cal. L. R. 269.

Legislature," property may be taken without compensation on the theory of *salus populi*. The examples given are those arising from the incidence of war.[22]

The case of *Mitchell* v. *Harmony*, 13 How. 115 (1852) was the first to come to this Court involving the executive power of emergency taking. The facts were as follows:

Harmony was a naturalized Spanish-American who took a large wagon train for trading purposes from Independence, Missouri, to El Paso

[22] The full quotation is as follows:

"It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner, and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defense of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as Gen. Jackson did at Orleans, to build ramparts against an invading foe.

"These cases illustrate the maxim, *salus populi suprema lex*. Per *Buller*, *J. Plate Glass Co.* v. *Meredith*, 4 T. R. 797. Noy's Maxims, 9th ed., p. 36. Dyer, 60 b. Broom's Maxims, 1. 2 Bulst. 61. 12 Coke, 13. [*The Saltpetre Case*, ed. note] Ib. 63. 2 Kent's Com. 338. 1 Bl. Com. 101, note 18, by Chitty. Extreme necessity alone can justify these cases and all others occupying the same ground."

during the Mexican War. Colonel Doniphan's unit, under the distant command of General Kearney, was in El Paso with about 1,000 men at the same time. Doniphan determined to attack Chihuahua, about 300 miles away in Mexico, and by order of his subordinate, Lt. Col. Mitchell, Harmony was compelled to accompany the troops in his wagon train. Other traders in El Paso were given similar orders. The purposes of the orders were threefold: Doniphan felt it necessary to enlarge his tiny military force by adding to it the 300 teamsters in the trading party; he desired the wagons for the formation of corrals on the march in case he should be attacked by the enemy if left behind or, more important in Harmony's case, that Harmony himself might trade with the enemy if left to his own devices.[23] The wagon train was therefore taken to Chihuahua, and subsequently fell into the hands of the enemy there.

Upon his return to the United States, Harmony petitioned Congress for compensation for his losses. Bills for this purpose were considered in both Houses in the 30th and 31st Congresses in 1848, 1849, and 1850, and bills on the subject passed each House. However, no agreement between the two Houses was ever reached, and Har-

[23] Depositions of Doniphan and Major Clark in Record of *Mitchell* v. *Harmony*, Sup. Ct., No. 178, Dec. term, 1851.

mony thereupon sued Mitchell personally for damages.[24]

The case was tried before a jury in the Circuit Court in New York with Mr. Justice Nelson, on circuit, presiding. On the basis of Justice Nelson's charge, 1 Blatch. 549, the jury, without leaving its seats, gave a verdict to Harmony for $90,000.[25]

Before the case came to this Court, Congress acted. On March 11, 1852, it passed an act, 10 Stat. 727, providing that Mitchell should be represented in the Supreme Court by the Attorney General, and that any judgment resulting should be paid by the United States.

The case thus came to the Court in this posture: Harmony's property had been taken by military action. Despite prevailing sentiment in both Houses of Congress that Harmony should be compensated, no compensation bill had been enacted. Harmony had no way of suing the United States, for the Court of Claims had not yet been created, and such cases as *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, and *United States*

[24] For record of Harmony's claim in Congress, see Sen. Misc. Docs. No. 11, 30th Cong., 1st sess.; H. Rept. No. 458, 30th Cong., 1st sess.; Cong. Globe, 30th Cong., 2d sess., 580–581. Senator Mason, in reporting the bill to the Senate, said: "Now, I apprehend it is clear that where private property is seized in time of war by a military officer for public purposes, the owner has a right to claim its value from the Government" (Cong. Globe, *supra*, 580).

[25] 13 How. at 141.

v. *Lynah,* 188 U. S. 445, holding the United States liable for takings on a theory of implied contract, were still many years in the future. Indeed, the first decision that the United States possessed a power of eminent domain was still more than twenty years distant, *Kohl* v. *United States,* 91 U. S. 367 (1876).[26] The United States, as the Court knew,[27] had assumed Mitchell's liability, and the only possible way of compensating Harmony under the circumstances was by affirming the jury's verdict.

The Court affirmed. It held that the trial judge had correctly instructed the jury that a military officer had the power to take private property for a public use but that the power could be exercised only in the event of an emergency.[28] The core of

[26] It is significant that the executive power to take property had been often exercised and had been expressly recognized by this Court before the Congressional power of eminent domain became established. The *Russell* case, cited *supra,* p. 122, antedated *Kohl* v. *United States* by five years.

[27] In accordance with the Compensation Act, Mitchell was represented in the Supreme Court by the Attorney General. The case was fully discussed by a Member of Congress with Justice Nelson when the compensation bill was before the House, and the Justice's informal views were before Congress. Cong. Globe, 32d Cong., 1st sess., 663.

[28] This emergency power was conceded by counsel for Harmony, who cited as precedent for its existence the New York fire case, *Mayor* v. *Lord, supra.* *Mitchell* v. *Harmony, supra,* 124.

the Court's opinion on this point is contained in the following passage, pp. 133, 134:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.
>
> But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

The Court did not consider whether on the facts in the case an emergency existed that justified the taking. The Court said specifically that that question was not before it; that it was a question of fact upon which the jury had passed and that the Court would confine its considera-

tion to "whether the law was correctly stated in the instruction of the court." 13 How. 134. Thus, although the actual holding of the *Mitchell* case is that the taking was invalid, the Court reached that result solely because of a jury finding that no emergency existed which justified the exercise of power which the Court ruled was possessed by the executive.

(b). As a result of the widespread executive takings during the Civil War, innumerable claims arose before state courts,[29] Congress,[30] the President, and the Federal courts in the reconstruction years. Congress, after elaborate debate, brought the problem to a sharp issue by passing,

[29] In Tennessee and Virginia it was held that action by municipal executives in collaboration with townspeople to destroy liquor which might otherwise have fallen to advancing Federal troops was a justifiable, noncompensable taking on the theory of *salus populi*. *Harrison* v. *Wisdom*, 54 Tenn. (7 Heisk.) 99 (1872); *Wallace* v. *City of Richmond*, 94 Va. 204 (1897). Both decisions rely on the conflagration cases discussed above. In Tennessee the impressment of wood for use on a government railroad in a friendly territory was also upheld, *Taylor* v. *Nashville & Chattanooga Railroad Co.*, 6 Cold (Tenn.) 646 (1869); and the impressment of horses by executive action was upheld in Missouri, *Wellman* v. *Wickerman*, 44 Mo. 484 (1868).

[30] In 1874 a Committee on War Claims of the House of Representatives submitted an elaborate report, usually referred to as the Lawrence Report. H. Rep. No. 262, 43rd Cong., 1st Sess. This report carefully distinguished between seizures on the theory of *salus populi* and takings by eminent domain. Report, p. 45. The report emphasizes that "there is a law overruling necessity, entirely distinct from the right of eminent domain. *Ibid.*, 50.

in 1872, a bill authorizing payment of a claim of J. Milton Best for compensation for destruction of his house by military order in the course of the defense of a fort at Paducah, Kentucky.[21]

President Grant vetoed the Best bill and in so doing enunciated the distinction subsequently adopted by the Supreme Court between two types of wartime takings. He said, in a passage later quoted with approval in *United States* v. *Pacific Railroad,* 120 U. S. 227, 238:

> It is a general principle of both international and municipal law that all property is held subject not only to be taken by the Government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to com-

[21] The prolonged debate on the Best bill called forth learned and elaborate argument from many members of Congress. The speakers explored thoroughly all writers and precedents, ancient and modern. Cong. Globe, 41st Cong., 3d sess., 97, 165, 295, 311. A similar discussion in the preceding Congress concerned the claim of Sue Murphey, whose house in Decatur, Alabama, was destroyed by the military authorities for the purpose of construction of fortifications many months after the entire area had been pacified by Union forces. For discussion, see Cong. Globe, 40th Cong., 3d sess., 274, 293, 381.

> pensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations are generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances it is a matter of bounty rather than a strict legal right.[32]

Meanwhile, the courts were creating a formal distinction between the two types of executive taking. In *Grant* v. *United States,* 1 Ct. Cls. 41 (1863), the issue was whether plaintiff should recover for destruction of his property at Tucson, Arizona, by a military order which had as its purpose the keeping of goods out of enemy hands. The court ruled that there were two types of taking of property, one done by eminent domain, and the other under the law of "extreme necessity" (p. 45), and held that, under the eminent domain power, private property might be rightfully taken by military officers without legislative authority (p. 47). Acknowledging that this power might be exercised only in circumstances of necessity, the court laid down this general rule as the measure of necessity (pp. 47, 48):

> The necessity must be urgent, but it need not be overwhelming; the danger must ap-

[32] 7 Richardson, *supra,* 172, 173. President Grant followed these principles in vetoing a subsequent bill for compensation for destruction of a salt works in Kentucky. *Ibid.* 216.

parently be near and impending, but it need not be actually present, threatening instant injury to the public interests.[33]

In two reconstruction cases, *United States* v. *Russell*, 13 Wall. 623, and *United States* v. *Pacific Railroad*, 120 U. S. 227, this Court further clarified the distinction between eminent domain and police power takings. In both cases, the Court held the executive takings to be lawful. However, because the necessity for, and circumstances of the occasions of taking differed in degree in each case, compensation was held to be due in the *Russell* case and not in the *Pacific Railroad* case.

In *United States* v. *Russell* the owner of three steamers that had been seized by Army Assistant Quartermasters at various points on the Mississippi during the Civil War brought a suit in the Court of Claims to recover compensation for their use. After temporary use by the Government the vessels had been returned to the owner. A statute had been passed on July 4, 1864, which provided that the jurisdiction of the Court of Claims should not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy while it was engaged in the suppression of the rebellion. The United States contended that the

[33] A dissenting opinion on grounds unrelated to the subject under discussion here in the *Grant* case is reported at 2 Ct. Cls. 551. The *Grant* case is followed in *Wiggins* v. *United States*, 3 Ct. Cls. 412 (1867) and see also *Heflebower* v. *United States*, 21 Ct. Cls. 228, 238 (1886).

taking of the three steamers was an "appropriation" of property within this statute and that therefore the Court of Claims had no jurisdiction to entertain a suit. The Court of Claims rejected the contention and its decision was affirmed by this Court. There was no special showing of emergency other than the bare statements of the Assistant Quartermasters that the ships were needed because of "imperative military necessity" and the Court of Claims made no finding of special necessity (5 Ct. Cls. 121). This Court stated that in extreme emergencies the executive branch of the Government possesses the taking power. It declared that in this case an emergency did exist, that the taking was lawful, that the United States was liable on a theory of implied contract for the use of the vessels, that the taking was not an appropriation within the meaning of the statute of 1864 and that the Court of Claims had properly assumed jurisdiction. See *supra*, p. 122.

The second of this pair of Supreme Court cases was *United States* v. *Pacific Railroad*. A number of railroad bridges had been destroyed in Missouri by order of the Federal Commander to prevent the advance of the enemy in the Civil War. Other bridges were destroyed by Confederates. Four of those bridges, two of which had been destroyed by the Northern and two by the Southern Armies, were rebuilt by the United States. The issue was whether the cost of the

rebuilding by the United States could be set off against claims of the railroad.

The Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the railroads. In reaching its result, the Court considered exhaustively the nature of government liability for the taking of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency" (120 U S. at p. 239), for which the Government is immune from liability. "The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*" (120 U. S. at p. 234)[34] The other type of taking is described by reference to *Mitchell* v. *Harmony* and *United States* v. *Russell,* and in such cases "it has been the practice of the Government to make compensation for the property taken."[35]

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[34] In describing this category, the court relied on *Respublica* v. *Sparhawk*, *Parham* v. *The Justices*, *Taylor* v. *Nashville and Chattanooga Ry.*, *Mayor* v. *Lord*, *Vattel*, and President Grant's veto message in the *Best case*, 120 U. S. 234, 238.

[35] "Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause." 120 U. S. at 239.

Once the distinction between compensable and non-compensable, or *salus populi* and eminent domain, executive takings in war-time had been clearly articulated, it followed almost as a matter of course that no rigid requirements of catastrophic emergency would be established for the latter type.

In *Alexander v. United States*, 39 Ct. Cls. 383 (1904), the government, through the Secretary of War, after termination of hostilities in the Spanish-American war but before the treaty of peace had been signed, took possession of a farm in Pennsylvania for training camp purposes, apparently without statutory authorization. The plaintiff had a fee simple reversionary interest in the land which was being temporarily occupied by a tenant. On claim of the tenant, the War Department paid rental for the use of the land but refused to pay the plaintiff for the permanent injuries done the land during the period of government occupancy. The plaintiff sued for compensation for injuries done his reversionary interests, on an eminent domain theory. The government defended on the ground that if the plaintiff had an injury, the injury was tortious, or, failing this defense, that the taking was one which required no compensation, on the theory of the law of war. The court gave judgment for the plaintiff. Rejecting the Government's second defense, the court noted that the property taken was "more than 1,000 miles from the nearest

approach of a public enemy." But in holding the taking to have been proper and compensable, the court dealt with the element of necessity as follows:

> There was a military necessity that some land in that vicinity should be taken. There is always a necessity when property is taken, and it implies no wrong on the part of the Government that it does take property without the consent of the owner. Underlying the exercise of the right is grant of power upon the expressed condition that compensation be made. [*Id.* at 396.]

See also, to the same effect, *Philippine Sugar Estates Development Co.* v. *United States*, 39 Ct. Cls. 225, 40 Ct. Cls. 33.

In short, at the turn of the century, the existence of executive power to seize private property during time of war or national emergency was firmly established, not only as a matter of executive construction and usage and legislative approval, but also by judicial decision. Viewing this history negatively, the executive power was frequently used and never stricken down. We know of no case which denied the existence of this power nor any instance in which a responsible majority of either House of Congress questioned its existence. Rather, as we have shown, it was always recognized that the executive does have the power and controversy arose only over the question whether a right to just compensation

flowed from the circumstances surrounding the taking.

The *Russell* case, if it stood alone, would, we submit, sustain the President's action here. This Court squarely held there that in time of "immediate and impending public danger * * * private property may be impressed into the public service * * * no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency" (13 Wall. at 627–628). And, on the bare statements of the Assistant Quartermasters who commandeered the ships that they were taken because of "imperative military necessity," the Court held the takings to be lawful. Certainly, as we have shown above, pp. 9–15, 28–49, the present public danger is at least as "immediate and impending."

(c). But the *Russell* case, and the others discussed above, do not stand alone. Since the turn of the century, there has been continued judicial recognition of the President's constitutional powers in this area. Although there appears to be no reported litigation as a result of purely executive takings during World War I,[36] the existence of the power was pointed out in an occasional strong dictum. See *Roxford Knitting Co.*

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[36] This circumstance may possibly be accounted for by the great number of requisition statutes in force during that war. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155, for a collection of such statutes.

v. *Moore & Tierney*, 265 Fed. 177, 179 (C. A. 2); *United States* v. *MacFarland*, 15 F. 2d 823, 826 (C. A. 4). Similar statements appeared in lower court opinions in World War II. See, *e. g.*, *Ken-Rad Tube & Lamp Corp.* v. *Badeau*, 55 F. Supp. 193, 197 (W. D. Ky.); *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145, 151 (C. A. D. C.), certiorari denied, 323 U. S. 735; *Alpirn* v. *Huffman*, 49 F. Supp. 337, 340 (D. Neb.) And a recent decision of this Court indirectly confirms the existence of a constitutional power in the President, in the nature of eminent domain, to seize property during time of war or national emergency. *United States* v. *Pewee Coal Co., Inc.*, 341 U. S. 114.

As in the instant suit, the *Pewee* case involved a non-statutory seizure by executive order of the coal mines on May 1, 1943, to avoid a nation-wide strike of miners [Executive Order 9340, 8 F. R. 5695]. Although no question was raised by the parties as to the validity of the seizure (see 115 C. Cls. 626, 676), the issue whether the seizure was an eminent domain taking within the meaning of the Fifth Amendment was squarely joined. It was the Government's position that the seizure did not constitute a taking within the meaning of the Fifth Amendment but that the seized property was merely in the custody of the Government, as would be property under conservatorship or temporary receivership, and

Pewee was not, therefore, entitled to just compensation. The Court rejected the Government's argument. The Court was divided on the question of the measure of just compensation, but it was unanimously of the opinion that there had been a taking of Pewee's property which would require the payment of just compensation under the Fifth Amendment whenever loss is suffered. Although the Court did not expressly so state, it is implicit in the decision in that case that there had been a valid exercise of executive power in the nature of eminent domain or requisition. See *supra,* pp. 67–68.

Finally, the court's attention is particularly directed to District Judge Amidon's disposition of a situation substantially identical to that presented in these cases. *Dakota Coal Co.* v. *Fraser,* 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8). The facts were these:—A coal mine strike in North Dakota had been called for November 1, 1919. Lignite coal was the fuel for the western half of the State. Because lignite coal, if exposed to the weather, disintegrates and becomes unfit for fuel, the public needs could be met only by continuous operation of the mines. A few days after November 1, winter set in with an unprecedented snow storm and the temperature fell to 8 to 10 degrees below zero over the whole area supplied by lignite. To meet this crisis, the Governor issued a proclama-

tion calling on the lignite coal mine owners to operate their mines, and, upon their failure to resume production, he called out the militia and seized the mines. Plaintiff mine owners then brought suit for injunctive relief against Fraser, the Adjutant General of the State.

Judge Amidon pointed out that (p. 416):

> The owners of the coal mines had already charged their right of private property therein with a public use. The continuance of the public service which such use involves cannot be separated from the right of private ownership. As to compensation, that can best be fixed by negotiation between the parties. But, if this fails, the state has expressly waived its exemption from suit, and the plaintiff may recover the reasonable value of the use of its property.

Continuing, the Judge observed that he knew (pp. 416–417):

> * * * the difference between verbal anarchy and real anarchy. I do not think the quiet and orderly operation of the coal mines, which has taken place under the management of the defendants in this case, can properly be characterized as anarchy. On the contrary, if the situation which was presented to the Governor at the time he called out the militia had been permitted to actually arise, and the people had been freezing to death and dying of disease

> because of the failure of fuel supplies, and men under the excitement of such a situation as that had been driven to acts of violence to relieve themselves against it, that perhaps might have been spoken of as anarchy.

And, finally, stating that "rhetoric is a poor substitute for coal" (p. 418), Judge Amidon concluded (p. 418):

> I am asked to issue a writ of injunction which will necessarily say that the acts of the Governor have been illegal and unconstitutional. If I do that, I am not simply dealing with his acts; I am defining the powers of the Chief Executive of an American commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the Governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus limit the agencies of the state to protect the rights of the public as against the exaggerated assertions of private rights.

In the light of these authorities, there is no basis for Judge Pine's reference to "the utter and complete lack of authoritative support for defendant's position" (R. 73). Contrast the opinion of the Court of Appeals below (per Circuit Judges Edgerton, Prettyman, Bazelon, Washington, and Fahy) (R. 447–448).

C. THE EXTENSIVE SYSTEM OF LAWS PROVIDING FOR NATIONAL SECURITY, WHICH THE PRESIDENT IS OBLIGATED TO ENFORCE, JUSTIFIED THE TAKING

We have reviewed (pp. 28–49) the admitted, and admittedly compelling, facts of the international situation which threatens intolerable risks and losses if American production of steel, most basic of military and industrial materials, should be interrupted. We have noted the comprehensive scheme of statutes and treaties in which the United States has by law pledged enormous portions of its human and material resources to cope with the continuing international crisis which, if it is not quite "war" on a full modern scale, is surely not peace. Viewed in terms of their total purpose, these laws make it clear that Congress has committed this Nation to a full-scale and increasing national defense program in which the critical production of steel must not be permitted to cease. This necessity for steel in order to carry out the will of Congress calls into play, not only the President's constitutional duty to "take Care that the Laws [treaties as well as statutes, *In re Neagle,* 135 U. S. 1, 64] be faithfully executed," but the whole array of the President's constitutional powers and responsibilities. See pp. 95–101, *supra.* In short, far from being inconsistent, the measures Congress has taken to deal with the national emergency authorize and serve to demonstrate the propriety of the President's action to keep the steel mills functioning.

Cf. *Madsen* v. *Kinsella*, No. 411, this Term, slip op., pp. 6–7.

We believe, therefore, that, if it were necessary, the President's action could be sustained merely as an exercise of his power and duty to execute the laws faithfully. Recognizing that steel "is the backbone of our economy" and that the steel industry "is of paramount importance both in peace and in war" (H. Rep. No. 2759, 81st Cong., 2d Sess., p. 5), Congress has enacted a series of measures designed to chart the Nation's course "in a struggle for survival" (S. Rep. No. 117, 82d Cong., 1st Sess., p. 3). The fact that the efficacy of these measures would be seriously threatened by a stoppage in steel production sustains the President's action.

For Congress has made it clear that its overriding concern at this juncture in our history is the preservation of our national security, and the statutes and treaties designed for this purpose leave no doubt as to the President's duty. Cf. *Ex parte Quirin*, 317 U. S. 1, 26. Paramount among the tasks Congress has committed to the President for execution is a mammoth effort to supply the material means to enable the United States and the whole "free world to stand secure against the present danger."[37] "Our partners

[37] H. Rep. No. 872, 82d Cong., 1st Sess., p. 5. This entire document, reporting the bill which became the Mutual Security Act of 1951 (Pub. L. 165, 82d Cong., 1st Sess., October 10, 1951), gives a graphic picture of the world-wide nature of American commitments.

need an uninterrupted supply of equipment to convert their manpower into effective military units."[38] "We have to supply most of the heavy weapons and equipment; we have to supply money, materials, machinery, and know-how to speed up European production of military equipment."[39] And in the supplying of these needs, as well as the needs of our own defense establishment, steel is probably the most vital single material.

The crisis in world affairs needs no further elaboration here. But we wish to emphasize a fact everybody knows—that Congress has acted on a broad scale to cope with the crisis and that this action places imposing responsibilities upon the President to see that our defense efforts succeed. Typifying the urgency which Congress recognizes almost daily in this area is the declaration of the Senate Committee on Armed Services reporting the 1951 Amendments to the Universal Military Training and Service Act (Title I of Pub. L. 51, 82d Cong., 1st Sess.):[40]

> The grim fact is that the United States is now engaged in a struggle for survival. The dimensions of that struggle cannot be measured. We do not know how long it will continue; we do not know how or

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[38] *Id.* at 62.

[39] *Id.* at 19.

[40] S. Rep. No. 117, 82d Cong., 1st Sess., p. 3.

> where a decision will be ultimately reached; we do not know what will be required of us.
>
> * * * * *
>
> To avoid increasing our national jeopardy, it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour.

Coping with a problem which it, as well as the President, sees as one of national survival, Congress has included among its sweeping measures provisions to insure that the kinds and quantities of materials required shall be continuously available. It has stated its intention to "prevent inflation [through a system of economic controls] * * *; to prevent economic disturbances, labor disputes, interferences with the effective mobilization of national resources, and impairment of national unity and morale * * *."[41] Determined to resist aggression with every necessary resource, Congress has legislated to give the President powers "to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives * * *."[42] And Congress, far from expressing aversion to drastic interferences with private property in the interest of national defense, has prescribed procedures for requisitioning and condemnation of

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[41] Defense Production Act of 1950, Pub. L. 774, 81st Cong., 2d Sess., Sec. 401.

[42] *Id.*, Sec. 2.

materials, equipment, and facilities which are vital and would otherwise be unavailable.[43]

We think the President's mandate from Congress is clear. An interruption or diminution in steel production means irremediable injury to the national defense, which the President has been solemnly charged to insure. It is true, as the steel companies have argued, that no statute specifically prescribes the action the President found necessary in this case to maintain steel production. Cf. pp. 57 ff., *supra*. But it has never been supposed that the limits of the President's duties are marked by the literal terms of statutes. See *In re Neagle*, 135 U. S. 1, 64–66. Judge Pine, in the district court, conceded that the President could dispatch troops and use all the force at the Nation's disposal to protect the mails (R. 83–84). See *In re Debs*, 158 U. S. 564, 582. In the present case, we submit, there was no less clear an implication of power to seize the steel companies from an array of statutes and treaties which commit the Nation by law to a program of self-preservation which could not fail to suffer from a loss of steel production. As Attorney General Jackson said of a situation substantially

[43] *Id.*, Title II, as amended by Pub. L. 96, 82d Cong., 1st Sess., Sec. 102; Selective Service Act of 1948, c. 625, Sec. 18, 62 Stat. 604, 625.

identical with the one presented here (89 Cong. Rec. 3992): [44]

> The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.
>
> The Constitution also places on the President the responsibility and vests in him the powers of Commander in Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the Nation are placed in his sole command and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the

[44] This statement was made at the time of the seizure of North American Aviation Company in 1941, because of a strike impeding defense production.

money and which it has directed the President to obtain.

It bears emphasis that, in the period of over a month since the Presidential action the steel companies attack, Congress has done nothing to repudiate or countermand that action. The President has made clear his readiness to accept and execute any Congressional revision of his judgment as to the necessary and appropriate means of dealing with the emergency in the steel industry. In the absence of such revision, we believe that the authority the President has invoked under the Constitution and laws is clearly valid. Intimately conversant with the necessities of the Nation's security, charged by the Constitution and Congressional enactment with the duty to meet those necessities, the President has seized the steel mills because he concluded that this was the only effective way to keep them operating. In the circumstances, with the great need for continuous steel production undisputed, his action was sustained by the extensive system of laws, both statutes and treaties, protecting and providing for the national security at this critical time.

III

THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE THE PRESIDENT'S EMERGENCY ACTION IN THIS CASE

Plaintiffs argue that, when they rejected the

zation Board to be fair and consistent with the stabilization program (and accepted by the union), the President should have convened a board of inquiry under Section 206 of the Labor Management Relations Act (61 Stat. 136, 155, 29 U. S. C., Supp. IV, 176) with a view toward ultimately seeking an injunction under Section 208 of that Act to bar a strike for another 80 days. Because this procedure was not followed, the companies contend, the President's temporary taking of the steel mills was unconstitutional.

This argument ignores the facts that (1) the substance, if not the precise forms, of the Labor Management Relations Act was more than achieved by the President and the parties to the labor dispute during the 99-day strike postponement; (2) the situation, when the President found it necessary to take the action here questioned, was such that the procedures of the Labor Management Relations Act would have been inadequate to prevent the cessation of steel production which it was necessary to prevent without the slightest delay; and (3) the patent unfairness of seeking to enjoin the union for another 80 days after it had voluntarily refrained from striking for 99 days would have written finis to the effectiveness of the Government's measures for enlisting the willing cooperation of labor and management in the settlement of labor disputes affecting defense production. And these measures, evolved under a Congressional mandate to provide "effec-

tive procedures for the settlement of labor disputes affecting national defense" (Defense Production Act of 1950, Sec. 501, Pub. L. 774, 81st Cong., 2d Sess.), are neither less important than, nor inconsistent with, the provisions of the Labor Management Relations Act.

At the most, plaintiffs' argument goes only to the wisdom of the President's "selection of the means for resisting" the threatened danger. On such an issue "it is not for any court to sit in review of the wisdom" of his action. *Hirabayashi* v. *United States,* 320 U. S. 81, 93. "The Constitution * * * does not demand * * * the impracticable" (*Yakus* v. *United States,* 321 U. S. 414, 424). The availability of an alternative which would have been far less effective cannot, without more, be taken to preclude the President from exercising his constitutional powers.

In any event, even if the wisdom of the President's choice were open here, there would be no ground for the companies' reliance upon the Labor Management Relations Act. For it is clear, and decisive of the argument under consideration, that the Labor Management Relations Act nowhere precluded the President's taking of the steel mills and that, far from insisting on that Act as the exclusive means for dealing with labor-management controversies, Congress in later legislation expressly stated its intention that other measures be devised for coping with the special problem of

threatened work stoppages affecting defense production.

A. THE PRESIDENT WAS NOT REQUIRED TO USE THE PROCEDURES OF THE LABOR MANAGEMENT RELATIONS ACT

1. Even considered by itself, the Labor Management Relations Act was plainly not intended to be either an exclusive or a mandatory means of dealing with labor disputes threatening a national emergency. Thus, Section 206 of that Act (29 U. S. C., Supp. IV, 176) provides that when in the President's opinion "a threatened or actual strike or lockout * * * will, if permitted to occur or continue, imperil the national health or safety, he *may* appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe" (emphasis added). Similarly, Section 208 (29 U. S. C., Supp. IV, 178) provides that upon "receiving a report from a board of inquiry the President *may* direct the Attorney General" to seek an injunction (emphasis added). The legislative history of these provisions, revealing an express rejection of proposals which would have made the board-of-inquiry and injunction procedures mandatory, makes it clear beyond doubt that the decision as to when or whether

such measures were to be invoked was committed to the President's discretion.[45]

Of even greater present significance is the fact that, in the years since enactment of the Labor Management Relations Act, Congress, in facing the special and acute problems posed by national defense needs, has explicitly directed the President to devise additional means of coping with labor disputes affecting defense production. Title V, Section 501 of the Defense Production Act of 1950 (64 Stat. 812, 50 U. S. C. App. (Supp. IV) Sec. 2121) provides:[46]

> It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and *to maintain uninterrupted production,* that there be *effective procedures* for the settlement of labor disputes affecting national defense. [Emphasis added.]

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[45] The House version of the bill which became the Labor Management Relations Act was phrased in mandatory terms ("the President shall direct the Attorney General to" seek an injunction—H. R. 3020, 80th Cong., 1st Sess., Sec. 203 (a), as reported in H. Rep. No. 245). The Senate version, which gave the powers to the Attorney General rather than to the President, used the word "may" (S. 1126, 80th Cong., 1st Sess., Secs. 206, 208, as reported in S. Rep. No. 105), the permissive significance of which was noted in the Senate debates. 93 Cong. Rec. 4594, 5012, 5115. In conference, the House provision for action by the President rather than the Attorney General and the Senate's permissive language were adopted, and the bill was thus enacted: H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 63–65.

[46] Section 501 was continued unchanged when the Act of July 31, 1951 (Pub. L. 96, 82d Cong., 1st Sess.) amended the Defense Production Act in various respects.

Section 503 of the same Act [47] goes on to declare that—

> * * * No action inconsistent with the provisions of * * * the Labor Management Relations Act, 1947, * * * or with other applicable laws shall be taken under this title.

As we show below (pp. 160–165), the procedure the President followed in this case was in no meaningful sense "inconsistent" with the provisions of the Labor Management Relations Act. What we would emphasize here is the unmistakable fact that, in calling for "effective procedures for the settlement of labor disputes", and in providing for action not "inconsistent" with the Labor Management Relations Act, Congress anticipated and intended the use of methods "other than" those created by that Act.

The need for such additional and supplemental methods was clear. Geared to a peacetime economy, framed at a time when relaxation of recent wartime controls was the order of the day, the Labor Management Relations Act was not designed to deal fully with the problems of labor relations posed by the special circumstances of a huge new defense effort and of an integrated stabilization program designed to prevent infla-

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[47] As amended in a presently immaterial respect by Section 105 (c) of Pub. L. 96, 82d Cong., 1st Sess.

tion. And so Title V of the Defense Production Act was enacted

> to strengthen the national defense effort by giving the President the necessary authority to prevent interruption of production by labor disputes which affect the national defense. In an emergency period we can ill afford to permit labor disputes to follow their normal course to eventual settlement. The institution of price and wage stabilization provided for under title IV of this bill would add to the strain upon normal collective bargaining. We therefore need a peaceful means of settling labor disputes which may threaten national defense or economic stabilization. [S. Rep. No. 2250, 81st Cong., 2d Sess., pp. 40–41.]

The Senate Committee reporting the provisions which became Title V contemplated

> that the President, in taking action in a labor dispute affecting national defense will have available to him the procedures provided by existing statutes, *as well as those authorized by this title.* For instance, if a dispute came within the terms of the national emergency provisions of the Labor-Management Relations Act, action *might* be taken under that act. [*Id.* at 41–42, emphasis added.]

But, once again, there was no thought that the President *must* use the Labor Management Relations Act provisions and no others.

2. Title V of the Defense Production Act was broad enough to authorize the President, after consultation with labor and management, to create a body like the War Labor Board of World War II—with power to decide disputes and nonjudicial sanctions for enforcement of its decisions. S. Rep. 2250, 81st Cong., 2d Sess., p. 41; S. Rep. 1037, 82d Cong., 1st Sess., pp. 4, 5–6.

Under Executive Order 10233 (16 F. R. 3503), the President has taken the moderate course of assigning to the Wage Stabilization Board authority to hear labor disputes affecting national defense where (a) the parties voluntarily submit them or (b) the President, regarding a dispute as a substantial threat to the progress of national defense, refers it to the Board. After investigation and inquiry, the Board is to make "recommendations to the parties as to fair and equitable terms of settlement" which are binding only where the parties have agreed that they should be. Where, as in the present case, the dispute is one referred to it by the President, the Board reports to him the results of its inquiry and its recommendations.

Within a month after this disputes procedure was placed in operation, a subcommittee of the House Committee on Education and Labor considered in hearings preparatory to possible amendments of the Defense Pro-

duction Act.[49] Similar hearings by a subcommittee of the Senate Committee on Labor and Public Welfare led to a report approving the machinery the President had established. S. Rep. No. 1037, 82nd Cong., 1st Sess. When it came to act on the extension of the Defense Production Act, Congress was thus fully apprised of the fact that the Wage Stabilization Board had been armed "with power to make recommendations for the settlement of labor disputes under specified conditions * * *". H. Rep. No. 639, 82nd Cong., 1st Sess., p. 17. With this fact clearly before it, Congress acted on the recommendations of both committees considering the extension bills,[50] and extended the Defense Production Act of 1950 with no change affecting the disputes functions of the Wage Stabilization Board.[51] Bills designed specifically to eliminate these functions were defeated.[52]

These briefly summarized developments leave no doubt that the re-enactment without change of Title V of the Defense Production Act must be viewed as specifically approving the disputes procedures the President invoked in this case. Cf. *United States* v. *South Buffalo R. Co.*, 333 U. S.

[49] Hearings before a Subcommittee of H. R. Committee on Education and Labor on Disputes Functions of the Wage Stabilization Board, 82nd Cong., 1st Sess.

[50] S. Rep. No. 470, 82nd Cong., 1st Sess., p. 15; H. Rep. No. 639, 82nd Cong., 1st Sess., pp. 29, 41.

[51] Pub. L. 96, 82nd Cong., 1st Sess.

[52] 97 Cong. Rec. 8390–8415.

771, 775–783. Congress was clearly persuaded by the view of its spokesmen who concluded that "Executive Order No. 10233 does not in any way run counter to the Defense Production Act or the Taft-Hartley Act." S. Rep. No. 1037, 82nd Cong., 1st sess., p. 10. Fully aware that the Defense Production Act "was designed to be broad and flexible enough to give the President the powers necessary to adapt the complex and intricate economy of the country to the demands of the heavy defense program" (H. Rep. No. 639, 82nd Cong., 1st sess., p. 15), Congress deliberately rejected proposals designed to prevent the President from choosing among complementary alternatives in dealing with the particular facts of particular labor disputes.

The President thus had the full consent of Congress when he referred to the Wage Stabilization Board disputes to which the emergency provisions of the Labor Management Relations Act were literally applicable. As the matter was put by a subcommittee of the Senate Committee on Labor and Public Welfare, reporting on its study of the disputes functions assigned by Executive Order 10233 to the Wage Stabilization Board (S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 4):

> It is conceivable that the same dispute will meet the requirements of the emergency disputes provisions of both the Taft-Hartley law and of the Executive Order.

> [Should such a situation] arise, the President is the initiating factor in both procedures, *and he will have the responsibility for deciding which route will dispose of the dispute most effectively*—or he *may* use both routes depending upon the circumstances. [Emphasis added.]

Against this background, we think it clear that in the 99 days between December 31, 1951, and the seizure on April 8, 1952, the President acted properly in exhausting a wholly sufficient alternative to the procedures under the Labor Management Relations Act.

3. By referring the dispute to the Wage Stabilization Board on December 22, 1951, the President achieved everything that he could have achieved under the Labor Management Relations Act. In addition, he invoked a procedure designed to ensure that any resolution of the wage dispute was geared to the overall requirements of the stabilization program.

It is undisputed that the union, having failed to reach an agreement with the companies, was prepared to strike on December 31, 1951 (R. 59). On this date, or in advance thereof, the President might have convened a board of inquiry under Section 206 of the Labor Management Relations Act. Upon receipt of the board's report, the President might have directed the Attorney General to seek a court order enjoining the strike. Section 208. This order would have been effec-

tive for a maximum of 80 days. Sections 209 (b) and 210.

This compulsory 80-day postponement of a strike or lockout is the heart of the benefit sought by the Act. During this period, the Act (Section 209 (a)) directs the parties, with the assistance of the Federal Mediation and Conciliation Service, "to make every effort to adjust and settle their differences * * *." Addressing himself to these provisions, Senator Taft said (93 Cong. Rec. 4262):

> The second part of that title provides that if mediation is not successful and a strike occurs in a Nation-wide industry, an injunction may be obtained for 60 days—for what purpose? In order to permit the Mediation Service to make further efforts to obtain a collective bargaining agreement between the employers and the employees.

It was contemplated that the period of delay would in most instances be sufficient to bring about a settlement through continued bargaining under the pressure of public opinion. See S. Rept. No. 105, 80th Cong., 1st Sess., p. 15. The 80 days would also provide time, in the event conciliation and bargaining failed, for consideration and formulation of special emergency action by Congress. See 93 Cong. Rec. 3836 (Senator Taft). As far as the Act itself was concerned, however, the parties would be free after 80 days to engage

in a strike or lockout. The conclusion of this postponement, important and efficacious as it might be in some cases, would mark the exhaustion of the Act's utility.

The significant fact here is that a delay longer than 80 days, coupled with the employment of settlement efforts which the President reasonably deemed more appropriate and more promising than those contemplated by the Labor-Management Relations Act, was achieved in this case. Called upon by the President to remain at work and strive for a settlement without an interruption of production, the union postponed its strike scheduled for December 31, 1951, four times—ultimately through April 8, 1952—a total of 99 days (R. 59–60). And these postponements, just like the 80-day delay provided by the Labor Management Relations Act, constituted an essential feature of the procedure the President employed. The simple reality, known to both the companies and the union, was that the inquiry, report, and recommendations of the Wage Stabilization Board were being used as an alternative to the inquiry and report, without recommendations, of a board under the Labor Management Relations Act—an alternative rendered appropriate by the fact that a "unified labor policy for the emergency makes it desirable that the disputes function be administered by the Wage Stabilization Board and not by a separate agency." S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 10. The parties knew that an

injunction against a strike was available under the Labor Management Relations Act, that the Wage Stabilization Board would probably not consider their dispute if a strike were called, and that the President's demand for continued production, backed by his powers of compulsion under the Labor Management Relations Act, was not lightly to be unheeded or ignored.

These thoroughly understood realities had been illustrated by events shortly preceding those involved here.[53] On August 27, 1951, widespread strikes of workers in the nonferrous metals industry were called. The President referred the disputes to the Wage Stabilization Board for settlement efforts similar to those employed in the instant case. Despite the declaration by the Wage Stabilization Board that it would not consider the disputes unless work was resumed, the strikes continued. On August 29, 1951, the Board referred the disputes back to the President with no report or recommendations, pointing out in its letter that, as it understood its responsibilities under Executive Order 10233, "it would not be appropriate for it to consider the merits of the dispute prior to the resumption of work." Accordingly, on the following day, the President created a board of inquiry under the Labor

[53] The account which follows of the nonferrous metals industry dispute is taken from the President's report to Congress contained in H. Doc. No. 354, 82nd Cong., 2d Sess., February 14, 1952.

Management Relations Act, and on September 5, 1951, following receipt of the Board's report by the President, the Attorney General obtained an order enjoining the strikes pursuant to Section 208 of that Act.

In the present case, the occasion for such an injunction was obviated by the union's voluntary postponement of its strike for more than the 80-day injunction period of the Labor Management Relations Act. The substance of that Act's objectives has been more than achieved. Collective bargaining, mediation, and the recommendations of a board responsible for adapting particular labor arrangements to the broad needs of an economy controlled for a huge defense effort and stabilized to prevent inflation have all been tried at length in an effort to reach a settlement. Subject of newspaper headlines for weeks, the steel dispute has been discussed repeatedly in Congress, both before and since the seizure, [54] and that body has had ample time to consider whatever action it might choose to take. The President, driven finally to a temporary taking of the steel mills in order to prevent the unquestioned crisis which a cessation of steel production would entail, has made it clear that he is fully prepared to execute any action Congress may direct. See communications to the President of the Senate, cited *supra*,

[54] See, *e. g.*, 98 Cong. Rec. (unbound) 3225–26, 3418–19, 3461, and pp. 18–22, *supra*.

pp. 19–20 (dated April 9 and April 21, 1952). To date, Congress has not acted.

In determining whether to use the Labor Management Relations Act procedure, instead of the Wage Stabilization Board, the President was compelled to take into consideration the fact that, since January 1, 1952 (when the old contract was no longer in effect), the probabilities were that, until a board under the Labor Management Relations Act could report, a crippling strike would have been in existence, and, after the expiration of the 80-day period of the injunction, the President, the public and the parties to the dispute would have been back where they started. Based on what actually happened, if the President had used the Labor Management Relations Act at the outset, the seizure would have taken place 19 days earlier than it did.

4. Now, having rejected the Wage Stabilization Board recommendations which the union was prepared to accept, and having failed to achieve a settlement through collective bargaining both before and after Government seizure, the last meeting being held in the White House on request by the President, the companies contend that the President was and is required to create a new board to find the facts again; and that an attempt should have been or should be made to compel the union by injunction to remain at work with unchanged terms for another 80 days. In substance, this contention, so patently devoid of

equity, amounts to a claim that the companies are entitled to have their employees compelled to work for a total of six months with unsatisfied demands for changes in their terms of employment. But such compulsion was not contemplated by the Labor Management Relations Act and was plainly inappropriate to the circumstances of this case.

Not only would invocation of the Labor Management Relations Act have been inequitable, but there is no reason to suppose that it would have prevented an interruption of steel production. Under the Labor Management Relations Act, an injunction may be sought only after a board of inquiry has investigated and reported to the President. With the complex facts of the present dispute, which occupied the Wage Stabilization Board for three months, there was no assurance that a report reflecting in any way the impartial study contemplated by the Act could have been prepared within any reasonably short space of time. Unless the report was to be an empty formality, there was danger that a strike during its preparation would cost precious and irreplaceable steel tonnage. And if it be suggested that the facts had already been found and needed no further study, this is merely another way of saying that the ends of the Labor Management Relations Act had already been fulfilled. Summarizing these considerations, the President

declared (Letter to the President of the Senate, 98 Cong. Rec. (unbound) 4192, April 21, 1952):

> It appears to me that another fact-finding board and more delays would be futile. There is nothing in the situation to suggest that further fact finding and further delay would bring about a settlement. And it is by no means certain that the Taft-Hartley procedures would actually prevent a shutdown.

In the circumstances of this case, it is at least highly questionable whether a court of equity would be prepared to enjoin the union from striking after the voluntary 99-day postponement. In *Hecht Co.* v. *Bowles*, 321 U. S. 321, where the statute provided that upon an administrative official's showing of certain facts "a permanent or temporary injunction, restraining order, or other order shall be granted without bond", this Court rejected the contention that injunctive relief was mandatory despite Congress' use of the word "shall." Section 208 of the Labor Management Relations Act, merely providing that the district courts "shall have jurisdiction" to issue injunctions or other orders, falls far shorter of the "unequivocal statement" of Congressional purpose which would be required to establish that the courts were placed under an "absolute duty" to issue injunctions "under any and all circumstances." *Hecht Co.* v. *Bowles, supra,* at 329.

But apart from the legal situation which might exist if the President had deemed the Labor Management Relations Act procedure appropriate and permissible, we submit the President's judgment that this procedure was futile, unfair, and improper was clearly a reasonable one.

In addition to the considerations of fairness which might move a court of equity, and which the President was certainly not required to disregard, is the practical fact that an effort to secure an injunction in this case would probably have ended the effectiveness of the disputes functions the President had assigned to the Wage Stabilization Board in cases involving national emergencies. These functions are exercised, and can be effective, only where the parties voluntarily continue production. Such voluntary restraint is promoted by the likelihood that an injunction will be used as an alternative. It is extremely unlikely that the "voluntary" method would ever be acceptable again if the alternatives turned out to be cumulative.

Charged with responsibility to weigh the considerations we have summarized, the President, after the union had voluntarily accepted restraints greater than those of the Labor Management Relations Act, could reasonably adopt the view that the invocation of that Act would have been an unjustified repudiation of the assumption on which the union had voluntarily refrained from striking,

and would not have been effective to insure the uninterrupted steel production which was and is so critically important. These wholly reasonable conclusions dispose of the contention that there was really no emergency because a Labor Management Relations Act injunction was not sought. The emergency in hard fact was the threatened stoppage of steel production. The President could properly conclude that the emergency should no more be cured by attempting to utilize the Labor Management Relations Act than by sacrificing the stabilization program to the price demands of the companies. Cf. pp. 47–49, *supra*. Because his rejection of these alternatives was proper, their existence is no basis for attack on the legality of the taking of the steel mills.

B. THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE EXECUTIVE SEIZURE

In the district court the companies argued that because Congress omitted any seizure provision when it wrote the Labor Management Relations Act, the action of the President in this case was precluded. But this argument, resting on the fallacious premise that Congress passed a law by not passing a law, misreads both the language and history of the Labor Management Relations Act, misconceives the nature of the President's constitutional powers, and ignores the critical history

and legislation that have followed the Labor Management Relations Act.

Apart from the problem of the provision for an injunction delaying a strike or lockout, discussed above (pp. 160–162), there is nothing in the LMRA itself to show that Congress intended to deny the President a power of seizure. Congress recognized that where a dispute was not settled during the period of delay, further action, not specified by the Act, might be required. It is true, as the companies have argued, that Congress foresaw and considered with favor the possibility that it might itself take action to handle a specific emergency. But there was, nevertheless, no suggestion that, in the absence of a settlement during postponement of a strike or lockout and in the absence of action by Congress, seizure by the President was intended to be precluded.

Congress did consider and omit a specific seizure provision. But the announced reasons for this negative action make it clear that it was not intended as an affirmative proscription of seizure. Explaining, Senator Taft said. (93 Cong. Rec. 3835–3836):

> We did not feel that we should put into the law, *as a part of the collective-bargaining machinery,* an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. *If such a remedy is available as a routine remedy,* there will always be pressure to resort to it by whichever

> party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided. [Emphasis added.]

This explanation makes it clear that what was avoided was a provision for seizure as a routine, expectable device.[55] Unwilling to hold out hopes of reward to recalcitrant parties who might anticipate benefits from seizure, Congress left for specific consideration in specific cases the course to be followed when delay and conciliation proved insufficient to settle a dispute. And Congress, which knows the delays and difficulties of legislation, certainly did not intend that a prolonged crisis should continue without remedy while a legislative solution was being hammered out.

In any event, what is important at this point is the obvious proposition that the failure of the LMRA to grant specific authority for seizure cannot be read as a prohibition against seizure.

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[55] Under the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. 309, seizure was the normal ultimate sanction for enforcement of War Labor Board orders. See I Termination Report of the National War Labor Board, chap. 39, p. 415.

Cf. Helvering v. *Clifford*, 309 U. S. 331, 337.[56] We have shown above (pp. 112–120) that Congress has repeatedly recognized the President's power of seizure in an emergency, with or without specific statutory authority. Nothing in the language or history of the LMRA purports to restrict Presidential power stemming from sources outside that Act. We do not argue that the LMRA is itself authority for the President's action; for this authority we have invoked the Constitution and a large body of other laws as they apply to the urgent circumstances of this case. *Supra*, Point II. Here we urge simply that, if the authority upon which we rely is otherwise ample, as we think it clearly is, it is in no way diminished by the failure of the Labor Management Relations Act to supply additional authority.

CONCLUSION

One of the great problems of the age is whether the democracies can find sufficient vigor and energy to respond promptly and decisively to the crises of our time. The century and a half since the drafting of the Constitution has witnessed an extraordinary growth in the magnitude, com-

[56] "There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will." Mr. Justice Rutledge, concurring in *Cleveland* v. *United States*, 329 U. S. 14, 22.

plexity, and interrelationship of the nation's problems. There has been an enormous increase in the tempo at which events occur, and decisions must be made. And above all there is the necessity with which the democracies are faced, if they are to maintain their very existence, to meet and overcome the challenge of dictatorship whether on the field of battle or in the market places of the world, where goods and ideas are traded.

We believe that these problems, like other problems which have arisen in the past, can be met within the framework of our Constitution. But they can be met only by regarding the Constitution as a "continuously operative charter of government" (*Yakus* v. *United States*, 321 U. S. 414, 424), which is capable now as in the past of adapting itself to the needs of new circumstances without sacrificing the basic principles of democracy and liberty. This Court has recently emphasized that "it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect" and that "in time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety." *Lichter* v. *United States*, 334 U. S. 742, 779–780. As was said by Chief Justice Hughes, "We have a fighting Constitution" which "marches" with events.

"There are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contained, in their general words and true significance, needed and adequate authority." Charles E. Hughes, *War Powers under the Constitution*, 42 A. B. A. Rep. 232, 247–8. "Equally in war and in peace" the particular provisions of the Constitution "must be read with the realistic purposes of the entire instrument fully in mind." *Lichter* v. *United States, supra*, 782.

The present case does not require this Court to "fix the outermost line" (*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 591). As we have sought to show, the issue before this Court is whether, in dealing with an immediate crisis gravely threatening the continuance of the production of perhaps the most essential commodity of our present civilization, the President could take temporary action, of a type not prohibited by either the Constitution or the statutes, to avert the imminent threat, while recognizing fully the power of Congress by appropriate legislation to undo what he has done or to prescribe further or different steps. We believe that the solution does not require the pressing of juristic principles to "abstract extremes" (*New York* v. *United States*, 326 U. S. 572, 577), but only a realistic consideration of the "necessities of the situation" (*Moyer* v. *Peabody*, 212 U. S. 78, 84).

For the reasons set forth above, we submit that the orders of the district court must be set aside. We have demonstrated the non-constitutional grounds which, we believe, compel reversal. When the constitutional question is reached, there is ample authority to sustain the President's action.

Final disposition of this case on either of these grounds will open the way for continued steel production and eliminate the occasion for further interruptions.

Respectfully submitted.

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